TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1904.

No. 126. 10.

HENRY LOCKHART, APPELLANT,

vs.

E. C. LEEDS, J. A. JOHNSON, JULIA A. JOHNSON, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED AUGUST 22, 1903.

(18,603.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 121.

HENRY LOCKHART, APPELLANT,

vs.

H. C. LEEDS, J. A. JOHNSON, JULIA A. JOHNSON, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 Be it remembered, that heretofore, on to-wit the 21st day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, a transcript of record, which said transcript of record, was and is in words and figures, following, to-wit:—

2 Be it remembered, that heretofore, to-wit, on the 26th day of May, 1894, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, plaintiff's bill of complaint, and exhibits thereto attached, which said complaint is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo for the Trial of Causes Arising under the Laws of the Territory of New Mexico, in Chancery Sitting.

To the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the said district court.

Henry Lockhart, a resident of the county of Bernalillo, and Territory of New Mexico, brings this his bill of complaint against, and complains of H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, James Q. Wills, Charles Pilkey, Frank Fagaly, Lee Walker, and Charles Bonsall, receiver, impleaded with said defendants by leave of court first had and obtained, William B. Childers and Edward W. Dobson, all residents of the said county of Bernalillo, defendants in this cause, and humbly complaining, shows unto your honor, that heretofore, to-wit, on the 7th day of May, 1893, a certain agreement in writing bearing said date was made and entered

3 into by and between your orator and one Benjamin Johnson, by the name and description of Benj. Johnson, with the defendant Charles S. Pilkey, a copy whereof is herewith filed, marked "Exhibit A," and made a part of this your orator's bill of complaint, wherein and whereby said Pilkey contracted and agreed with your orator and the said Benjamin Johnson to enter into a copartnership with them for the purpose of discovering, locating, and operating mining claims; and it was thereby contracted and agreed by and between said parties that the said Pilkey should prospect and locate such veins, lodes or placers as he might discover or know the existence of, containing valuable ore or minerals, in the name of and for the joint benefit of all the said parties to said agreement in the proportion of one-third interest to said defendant Pilkey and an undivided two-thirds interest to your orator and the said Benj. Johnson; and your orator and the said Benj. Johnson thereby contracted, in consideration of the premises, to furnish to the said Pilkey at

their expense the following articles and tools, viz: Twenty-five pounds of giant powder, 100 feet of fuse, one box of caps, one hammer, — pounds of drilled steel and one pick; and when he should have sunk or driven a shaft or tunnel four feet by six feet from the lowest level of the surface at its mouth upon such vein and locality as should be designated by them, he should receive in addition to the above property the sum of thirty dollars, less any money for provisions or other articles, except these above named, which should be furnished to him by them prior to the completion of said work; and it was thereby further contracted and agreed that said work should begin within twenty days from the date of the said agreement and should be prosecuted with
4 due diligence to completion and to the satisfaction of the orator and the said Johnson, and that the said Pilkey should furnish to them from time to time at their request samples of all ores and minerals which should be discovered or taken out of any workings by the said Pilkey; and it was thereby further contracted and agreed that it should be at the option of your orator and the said Benjamin Johnson to continue working or abandon any claim located in pursuance with said agreement, at any time they might deem proper and that the said agreement should continue in force and effect for one year from its date and that all discoveries or locations made during that time by said Pilkey should be included and covered by the said agreement; and it was thereby further contracted and agreed that the said Pilkey should have no power to create any debt or make any contract binding the said other parties to said agreement unless by them authorized in writing so to do; and that any concealment by or on the part of the said defendant Pilkey of any discovery by him made or failure upon his part to locate any valuable mineral claim or claims for the purpose of evading the terms of the said agreement, and defrauding your orator and the said Benjamin Johnson, should work a forfeiture of any right or interest, direct or indirect, that the said Pilkey might have or afterwards obtain, to and for the benefit of your orator and the said Benjamin Johnson.

And your orator states that the agreement aforesaid was duly subscribed, executed and delivered by and between the said parties thereto and your orator and the said Benjamin Johnson then and there delivered the said articles and provisions and paid the said money to and for the said Pilkey, and in all respects kept
5 and performed the terms of the said agreement upon their part, and were at all times thereafter ready and willing and offered so to do.

Your orator further states that, at and prior to the date of said agreement, the said parties thereto had knowledge or information of the existence of valuable mineral deposits in the northeasterly portion of the said county of Bernalillo, in the vicinity of the town called Cochiti, and that it was their purpose in pursuance of said agreement that the said Pilkey should prospect, search for, discover,

locate and acquire title to the same for their joint use and benefit in the proportion and upon the terms therein set forth.

And your orator further states that, under and in pursuance of the terms of said agreement, the defendant Pilkey, did thereafter proceed to the aforesaid portion of said county, and did on or prior to the 10th day of July, 1993, find and discover a certain valuable mineral bearing lead, lode, ledge, vein or deposit bearing gold and silver, and did then and there enter upon and take actual, full and peaceable possession of the same, for and on behalf of your orator and the said other parties to said agreement as claimants, discoverers and locators of the same under and in pursuance of the terms of the said agreement, and as evidence thereof, the said Pilkey then and there posted in a conspicuous place upon the said lead, lode, ledge, vein or deposit bearing mineral, a notice of the location thereof bearing the said date, a copy whereof is herewith filed, marked "Exhibit B," and made a part of this your orator's bill of complaint, and marked the boundaries of the said claim upon the ground in such manner that the same could be readily traced and thereafter
6 transmitted to your orator and to said Benjamin Johnson at their request samples of ores and minerals by him taken and extracted from the said mineral bearing lode, lead or ledge so by him discovered and taken possession of as before stated, and did thereafter, in pursuance of the direction of your orator and said Johnson commence to sink a shaft, or cut, upon said mineral bearing lode or ledge to the depth of ten feet from the lowest rim thereof, and your orator is informed and believes and so states that he did so sink said shaft or cut thereupon to mineral in place disclosing a large and valuable deposit of gold and silver bearing ore in place within less than ninety days from the time of taking possession of said lode or ledge as aforesaid; and your orator states that they the said discoverers and locators of said mineral bearing lode or ledge, not then knowing whether the said mineral claim was situated upon public domain of the United States and was free and open to location under the mining laws of the United States, performed the required acts of location under said laws and the laws of this Territory, or were ready, able and willing so to do and would have so done except for the wrongful, fraudulent and unlawful acts of the defendants hereinafter mentioned.

Further complaining, your orator shows unto your honor that on or about October 1st, 1893, the defendant Pilkey, while so in possession of the said lead, lode or ledge, under and in pursuance of said agreement, wrongfully and unlawfully conspired, combined and confederated with the defendants H. C. Leeds, J. A. Johnson, Frank Fagaly, and Lee Walker to defraud your orator and the said Benjamin Johnson of their interest in and title to the said mine and minerals discovered and possessed by them as
7 aforesaid, and of which the said Pilkey was then in possession under the agreement aforesaid, and that in pursuance of said conspiracy and confederation, on, to-wit, October 1st, 1893, the precise date whereof being unknown to your orator, and agreement was

made and entered into by the defendants Fagaly, J. A. Johnson, Walker and Leeds, the defendant Julia Johnson being a party to and having some interest under the said agreement, and the defendant Pilkey, being a party thereto, by which it was agreed that the said Pilkey in violation and fraud of the rights of your orator in and to the said mine of which he was then in possession as aforesaid, by him discovered and held under said agreement, should deliver—surrender possession to said last named defendants without the knowledge and consent of your orator and the said Johnson, and that they should do and perform all other acts deemed necessary for that purpose, and that in pursuance of said fraudulent combination and conspiracy, the defendants Frank Fagaly, J. A. Johnson, Lee Walker, and H. C. Leeds, together with the defendant J. Q. Wills, caused and procured the defendant Pilkey to stop work upon the said mines under his said agreement and to fail and neglect to record the said location notice, so by him posted thereon as aforesaid, and the said defendants or some of them wrongfully removed the said location notice from said claim and said defendants covered up or concealed the said workings thereon, theretofore done and performed by defendant Pilkey as aforesaid, and entered into and upon the said lead, lode, ledge and deposit bearing gold and silver, mentioned and described in the location notice heretofore described as the "Sampson" mine, and

8 denied and still deny that your orator had or has any interest therein and thereafter, having so procured possession of the same, the said defendants in pursuance of said confederacy, caused to be posted upon said mine a location notice, and filed the same for record in the recorder's office of said county on, to wit, December 30th, 1893, and caused the same to be there recorded in Book E, page 576, of mining records and a copy whereof is herewith filed, marked "Exhibit C," and made a part of this bill, and thereby the said defendants claim to have located the said lead, lode or ledge bearing gold and silver and other minerals, so first discovered, located and held by the said Pilkey, and described in the said location notice by him thereon posted as aforesaid as the "Sampson mine" for the benefit of themselves as locators under the mining laws of the United States and called and designated the same as the "Washington" lode, and it was agreed in pursuance of said federation and for the purpose of concealing from your orator the interest of said Pilkey in said pretended location that each of the four last named defendants should be entitled to a one-fifth interest in said mine, and the said Pilkey should be entitled to the remaining one-fifth, but that said last named interest should be covered up and concealed.

Your orator further states that the said Benjamin Johnson has since conveyed to him all his interest in and to the said Sampson location and mine, and your orator has become and now is the owner of the title and interest of the said Benjamin Johnson.

Further complaining your orator states upon his information and belief that the said mine called and known as the "Sampson" mine is situated within the exterior boundaries of a tract of land

claimed to have been granted, on August 2nd, A. D. 1728, by
9 the then governor and captain general of New Mexico, under the Crown of Spain, to one Antonio Lucero, and that the same at date of discovery of the said mines by said Pilkey was and now is claimed by certain persons under the said alleged grant, and claims therefore under said grant were at the date of said discovery, and now are pending in the United States Court of Private Land Claims and are undetermined, but your orator is advised by counsel and believes and so states the fact to be that the said alleged grant to the said Antonio Lucero did not effect the donation of sale of the said lode, ledge, or vein bearing gold and silver, so discovered and held by the said Pilkey and called and known as the "Sampson" mine, and that the said Antonio Lucero has not nor have his heirs, representatives or successors had not in any manner nor have they since become entitled in law or in equity to the gold, silver or minerals contained in the said lead, lode or ledge, called and known as the "Sampson" mine; and your orator avers that by virtue of the said prior discovery, possession, working and location of the said mine by said Pilkey, acting under the agreement before mentioned, your orator became and now is equitably entitled to the said gold, silver and minerals therein contained and have and has prior and paramount right and title in and to the same.

Your orator further states that the defendant Wills claims some right or interest in and to the said pretended mining location called and known as the Washington mine derived under or through some of the said other defendants but your orator states that the said Wills and the said Leeds, J. A. Johnson, Julia Johnson, Fagaly and
Walker, at and prior to the time of acquiring any interest in
10 said mine, had full notice and knowledge of the rights of your orator and Benjamin Johnson in and to said mineral deposit and of their said agreement with said Pilkey herein before mentioned, and that in pursuance of the said conspiracy, they committed the acts herein before mentioned and took possession of said mineral deposits, and have ever since except as hereinafter stated held such possession and by violence and threats have hindered and prevented your orator from entering upon the same and from completing the acts of location required by the laws of the United States and of this Territory as he otherwise could and would have done; although your orator is advised and so states that the said mineral deposit is so discovered by said Pileky as aforesaid was not and is not subject to location as a mining claim under and in pursuance of the laws of the United States for the reason that the same is situated as aforesaid within the said alleged private land grant to said Antonio Lucero, but your orator states that by virtue of the said prior discovery, possession and workings of the said lode or mine by said Pilkey under said agreement, he became and was and now is equitably entitled to the said gold, silver and minerals contained in said location called the Sampson mine as against the said defendants or any other person or persons whomsoever except the Government of the United States, and that under and by virtue of mesne convey-

ances your orator has acquired an undivided title and interest as a tenant in common with the other heirs and representatives of said Antonio Lucero in and to the said land included in said alleged grant to said Antonio Lucero, and is lawfully entitled to enter upon and work the said mine.

Your orator further states that here*be*fore the defendant
11 Charles Bonsall in a certain cause pending in this court wherein the defendant James Q. Wills was and is complainant and the defendants Leeds, J. A. Johnson, and Julia Johnson, Wills, Fagaly, Walker and Pilkey, together with one T. B. Mills and J. T. Dougine were and are defendants, was appointed by this honorable court as receiver of the said alleged Washington lode, under the said pretended location thereof by defendants Leeds, J. A. Johnson, Fagaly, Walker and Pilkey, under the name of the "Washington" mine, and that the said Bonsall in pursuance of said order of appointment has entered upon and taken possession of the said Sampson mine and now holds possession of the same as such receiver.

Your orator further states that after the removal by said defendants of the said location notice posted as aforesaid by said Pilkey of the said "Sampson mine," a copy thereof was procured by your orator, of which "Exhibit C" filed herewith is a copy and the same was recorded in the office of the recorder of said county, on December 9th, 1893, in volume F of mining records of said county, folio 7.

Your orator states that by virtue of the premises he became and was and now is the equitable owner of the said mine and gold and silver ores therein contained so discovered, possessed and located by the said Pilkey under the said agreement, and is equitably entitled as against the said defendants to the possession and enjoyment of the same, and that the said pretended location thereof under the name of the Washington mine by and in the names of defendants Leeds, J. A. Johnson, Fagaly and Walker, was and is wholly inoperative and void, and that the defendant Charles Pilkey by reason of his participation in the said fraudulent conspiracy, combination and acts
12 with said other defendants, under and in pursuance of the terms of your orator's said agreement with him, has forfeited all right or interest direct or indirect in and to the said Sampson mine and your orator is equitably the owner of and entitled to the same, and your orator had well hoped that the said defendant would recognize the prior right and title in and to the same and surrender possession to the same and release all claims thereto to your orator, but now so it is that said defendants excepting defendant Bonsall as receiver, combining and confederating together as aforesaid give out and claim in speeches that the said pretended location and location notice of the said alleged "Washington" lode by the said defendants was and is a valid location as against your orator and that your orator has no title or interest in and to the said mine bearing gold, silver and other minerals, so discovered, possessed and located as the "Sampson mine" by the defendant Pilkey as hereinbefore set forth,

and refused to permit your orator to enter upon the said property or to work the same or exercise any acts of possession or ownership thereon.

Your orator therefore prays that the said H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, J. Q. Wills, Charles Pilkey, Frank Fagaly, Lee Walker and Charles Bonsall, receiver as aforesaid, may respectively be made part- *of the* defendant to this your orator's bill of complaint, and that they be required to full, true and perfect answers make to all and singular the allegations of this bill, but without oath, their respective answers under oath being hereby waived, and that the receiver be appointed to take possession of the lead, lode, ledge or deposit, bearing gold, silver and other metals, situated within the mining claim or location, in the Cochiti
13 mining district, Bernalillo county, New Mexico, called and known as the "Sampson" mine and mentioned and described in the location notice thereof made by Charles Pilkey, Ben. Johnson and Henry Lockhart, dated July 10th, 1893, and recorded in vol. 5 of mining records of said county, folio 7, on December 9th, 1893, to keep and hold possession thereof until the further order of this court, and that the location and location notice of the said Washington lode by and in the name- Frank Fagaly, Lee Walker, H. C. Leeds, and J. A. Johnson be decreed to be void and of no effect as against your orator, and that the said defendants be enjoined from mining, working or removing from the said "Washington" lode any ore or mineral and your orator be decreed to be the owner of the said ore and mineral contained therein and entitled to possession to the same and for such other and further relief as may be equitable and proper in the premises.

May it please your honor to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendants H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, J. Q. Wills, Charles Pilkey, Frank Fagaly, Lee Walker, and Charles Bonsall, receiver of the Washington lode, requiring them and each of them under a certain penalty therein named to be and appear before this honorable court at the time and place therein specified then and there to answer the allegations of this bill and to stand to abide and perform the order of the court in the premises.

May it please your honor to grant unto your orator the writ of injunction enjoining the said defendants and their respective agents and employés from in any manner interfering with the pos-
14 session of the said receiver of the said "Sampson mine" and from extracting or removing any ore or mineral therefrom or from claiming or exercising any ownership or title of, in or to the said ore or mineral, under color or by virtue of the location of the said "Washington lode" by or in the name of the defendants Frank Fagaly, Lee Walker, H. C. Leeds and J. A. Johnson, until the further order of this court.

(Signed) HENRY LOCKHART,
WARREN, FERGUSSON & BRUNER,
Sols. for Complainant.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Henry Lockhart, being duly sworn, says that he is the complainant in the above and foregoing bill of complaint, by him subscribed, and has heard read and knows the contents thereof and the matters and things therein contained are true of his own knowledge, except as to the matters and things therein stated to be upon information and belief, and as to those matters he believes them to be true.

(Signed) HENRY LOCKHART.

Subscribed and sworn to before me this 25th day of May, 1894.

(Signed) MEYLERT BRUNER,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed: No. 3888. Territory of New Mexico. County of Bernalillo. In the district court, second judicial district. Henry Lockhart *vs.* H. C. Leeds *et al.* Bill of complaint. Filed in my office this 26th day of May, 1894. O. N. Marron, clerk.)

"EXHIBIT A."

Articles of Agreement.

For and in consideration of the sum of one dollar to him
15 in hand paid, the receipt of which is hereby acknowledged, Charles Pilkey, party of the first part, agrees with Henry Lockhart and Benjamin Johnson, parties of the second part, all of whom are residents of Bernalillo county, New Mexico, to enter into a partnership for the purpose of discovering, locating and operating mining claims.

The considerations of this agreement are that the said first party shall prospect and locate such veins and lodes and placers as he may discover or know the existence of containing valuable ores or minerals in the name of and for the joint benefit of all the parties hereto; in the proportion of one-third interest to said first party and an undivided two-thirds interest to the second parties.

The said second parties are to furnish the said first party at their expense with the following articles and tools, viz:

Twenty-five pounds of giant powder, 100 feet of fuse, one box of caps, one hammer, —— lbs. of drills steel, and one pick, and when he shall — sunk or driven a shaft or tunnel four feet by six feet in a vein of mineral bearing quartz to a depth of twenty feet from the lowest level of the surface at its mouth, such vein and locality to be designated by said second parties, he shall receive in addition the sum of thirty dollars, less any moneys or provisions or other articles except as above enumerated.

Said work to be begun within twenty days from the date of this agreement and prosecuted with due diligence to the completion and to the satisfaction of the said second parties. The said first party to furnish the second parties from time to time at their request samples of all ores and minerals discovered or taken out of any workings.

16 It shall be at the option of the said second parties to continue working or abandon any claim located at any time they deem proper. This agreement to continue in force and effect for one year from its date, all discoveries or locations made during that time by said party to be covered by this agreement. The said first party has no power to create any debt or make any contract binding the second parties to this agreement unless authorized to do so in writing by the said second parties. Any concealment of a discovery or failure to locate of a valuable mineral claim or claims for the purpose of evading the terms of this agreement and defrauding the said second parties shall work a forfeiture of any right or interest, direct or indirect, that such first party might have or afterwards obtain to and for the benefit of the said second parties.

Dated May 7th, 1893.

(Signed) CHARLES PILKEY. [SEAL.]
" HENRY LOCKHART. [SEAL.]
" BENJ. JOHNSON. [SEAL.]

Witness:
W. C. HEACOCK.

(Endorsed on back: "Article of agreement—Charles Pilkey and Lockhart and Johnson." Also seal and certificate of recordation, signed by J. W. Harris, recorder, that same was filed for record on the 7th day of December, 1893, at 11 o'clock a. m. in vol. E. of mining records of Bernalillo county page 562.)

"EXHIBIT B."

The undersigned, —— ——, citizens of the United States, over the age of 21 years, having complied with all the requirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs, and
17 regulations in force relative to such locations, have located and do hereby claim by right of discovery and location fifteen hundred (1500) linear feet on and along this lode, vein, deposit of mineral bearing rock in place, together with three hundred (300) feet of surface ground along and on each side of said 1500 feet. The claim hereby located is situate in the Cochiti dis. mining district, county of Bernalillo, Territory of New Mexico, and is more particularly described as follows:

Beginning at the monument of stones (monument No. 1) erected on said lode, lead and deposit, said monument No. 1 being the north end monument of this claim, and being the center of the north end line of said claim; thence west 300 feet to a monument of stones (No. 2); thence south 1500 feet to a monument of stones (No. 3); thence east 300 feet to a monument of stones (No. 4), said monument No. 4 being the south end monument and the center of the south end line of this claim; thence east 300 feet to a monument of stones (No. 5); thence north 1500 feet to a monument of stones (No. 6); thence west 300 feet to the place of beginning.

And for further description the lode is of grayish quartz from three to five feet wide, and can be traced for (1000) yards, dips into the mountain.

This claim was located July 10th, A. D. 1893, and shall be known as the "Sampson mine." A copy of this notice is placed on monument No. — in the center of claim by a pine tree with bark of- on south side.

CHARLES PILKEY,
BEN. JOHNSON,
HENRY LOCKHART,
Locators.

18 Notice posted on claim in presence of—
IDA PILKEY,
LEE DUDLEY.
Witnesses.

(Endorsed: Name of claim, "Sampson mine." Names of locators, Charles Pilkey, Ben. Johnson, Henry Lockhart. Territory of New Mexico, county of Bernalillo, *ss.* I hereby certify that this instrument was filed for record on the 9th day of December, A. D. 1893, at 11 o'clock a. m., and recorded December 19th, A. D. 1893. J. W. Harris, recorder.)

"EXHIBIT C."

Notice of Location.

The undersigned, citizens of the United States, over the age of twenty-one years, having complied with all the requirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs and regulations in force relative to such locations, have located, and do hereby claim by right of discovery and location 1500 linear feet on and along this lode, vein, deposit of mineral bearing rock in place, together with 300 feet of surface ground along and on each side of said 1500 feet.

The claim hereby located is situated in the Cochiti mining district, county of Bernalillo, New Mexico, and more particularly described as follows:

Beginning at post No. 1 erected on said lode, lead and deposit, said post being the north end center monument of this claim, and being the center of the north line of said claim marked ("north end center post"); thence east 300 feet to the northeast corner
19 post No. 2, marked "northeast corner post;" thence south 1500 feet to post No. 3, southeast corner post, marked "southeast corner post;" thence east 300 feet to post No. 4, marked "south end center post;" thence 300 feet to post No. 5, marked "southwest corner post;" thence north 1500 feet to post No. 6, marked "northwest corner post;" thence east 300 feet to the place of beginning. All of said marks being in pencil, and the discovery shaft of said claim being located within the exterior lines thereof and on the lode or lead located and upon which said discovery shaft is posted a copy

of this notice of location, and in the monument of stones around all of said post referred to are piles of stones.

Said claim being about two miles north of Peralta mountain, Cochiti mining district, Bernalillo county, New Mexico.

This claim is located in the said mining district, about 60 feet from the north end center where location line paper is nailed to pine tree about 60 feet south of north end center line. Direction from a big pine tree marked with a blaze.

This location is an amended location of said claim, the original thereof having been made on the 20th day of October, A. D. 1893. Said claim shall be known as the "Sunny South lode." Located by F. Fagaly, J. A. Johnson, H. C. Leeds, Lee Walker, locators.

Filed for record December 30th, 1893, at 10 a. m., and recorded January 15th, 1894.

"EXHIBIT C."

The undersigned, —— —— citizens of the United States and over the age of twenty-one years, having complied with all requirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs and regulations in force relative to such locations, ha- located, and do hereby claim the right of discovery and location, fifteen hundred (1500) linear feet on and along this lode, vein, deposit of mineral bearing rock in place, together with three rundred feet of surface ground along and on each side of said 1500 feet. The claim hereby located is situate in the Cochiti mining district, county of Bernalillo, Territory of New Mexico, and is more particularly described as follows:

Beginning at a monument of stones (monument No. 1), erected on said lode, lead and deposit; said monument No. 1 being the north end monument of this claim and being the center of the north end line of said claim; thence west 300 feet to a monument of stones (No. 2); thence south 1500 feet to a monument of stones (No. 3); thence east 300 feet to a monument of stones (No. 4), said monument No. 4 being the south end monument and the center of the south end line of this claim; thence 300 feet to a monument of stones (No. 5); thence north 1500 feet to a monument of stones (No. 6); thence west 300 feet to the place of beginning.

And for further description the lode is of grayish quartz, from three to five feet wide, and can be traced for 1000 yards. Dips into the mountain.

This claim was located July 10th, A. D. 1893, and shall be known as the Sampson mine. A copy of this notice is placed on monument No. — in the center of the claim by a pine tree with bark off on the south side.

CHAS. PILKEY,
BEN JOHNSON,
HENRY LOCKHART,
Locators.

21 Notice posted on the claim in presence of
ADA PILKEY,
LEE DUDLEY,
Witnesses.

(Endorsed on back: Notice of mining location. Name of claim, "Sampson." Name of locators, Charles Pilkey, Ben Johnson, Henry Lockhart. Filed for record this — day of —— A. D. 189–. —— recorder. Territory of New Mexico, county of Bernalillo. This instrument was filed for record on the 9th day of December, 1893, at 11 o'clock a. m. Recorded in volume F of mining records of said county, folio 7. J. W. Harris, recorder.)

And thereafter, on, to-wit, the 10th day of July, 1894, there was filed in the office of the said clerk of said court, in said cause, the appearance of Lee Walker, which said appearance is in words and figures following, to-wit:

In the District Court, Bernalillo County.

HENRY LOCKHART
vs.
LEEDS, WALKER, ET AL. } No. —.

Chancery, for injunction.

Now comes Lee Walker, by his attorney, W. C. Heacock, and enters his appearance in the above entitled cause, and waives issuance and service of process therein.

(Signed) W. C. HEACOCK,
Att'y for Lee Walker.

(Endorsed: No. 5888. In the district court, Bernalillo county. Henry Lockhart *vs.* Leeds, Walker *et al.* Appearance of Lee Walker. W. C. Heacock, attorney for Lee Walker. Filed in my office this 10th day of Jul-, 1894. O. N. Marron, clerk.)

22 And thereafter, on, to-wit, the 12th day of July, 1894, there was filed in the office of the clerk of said court, in the said cause the appearance of defendants, which said appearance is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

HENRY LOCKHART
vs.
H. C. LEEDS ET AL. } No. —.

Now comes the defendants, H. C. Leeds, J. A. Johnson, Julia Johnson, J. Q. Wills, and Charles Bonsall, by Childers and Dobson,

their solicitors, and enter their appearance therein, and waived the issuance and service of process on them, and the defendants William B. Childers and Edward W. Dodson, also defendants in the above cause, hereby enter their appearance in said cause.

Said appearance so entered to be as of the first Monday in July, 1894.

(Signed) CHILDERS & DOBSON,
Solicitors for the Above-named Defendants.

(Endorsed: No. 3888. District court, Bernalillo county. Henry Lockhart *vs.* H. C. Leeds *et al.* Def'ts' appearance. Childers & Dobson, sol's for within named def'ts. Filed in my office this 12th day of Jul-, 1894. O. N. Marron, clerk.)

And thereafter, on, to-wit, the 12th day of July, 1894, there was filed in the office of the said clerk of said court, in said cause, the defendants' demurrer, which said demurrer is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court, Second Judicial District.

HENRY LOCKHART, Complainant,
vs.
23 H. C. LEEDS, J. A. JOHNSON, JULIA JOHNSON, J. Q. WILLS, Charles Pilkey, Frank Fagaly, Lee Walker, Chas. Bonsall, E. W. Dobson, and W. B. Childers, Defendants.

And now come the above named defendants, H. C. Leeds, J. A. Johnson, Julia Johnson, and J. Q. Wills, and Chas. Bonsall, by their solicitors, Childers W. B., and E. W. Dobson, and the defendants Chas. Pilkey and Lee Walker, by their solicitor, W. C. Heacock, and defendants W. B. Childers and E. W. Dobson, in their own proper persons, by protestation, not confessing or acknowledging any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth, and alleged; and demur to said bill and for causes of demurrer allege the following:

1. Because the bill does not allege that the defendants, Fagaly, Johnson, Leeds and Walker entered in and upon said mining claim at any time prior to the 10th day of October, 1893, that is to say, within three months after said mine is alleged to have been located under the name of Sampson.

2. Because it appears from the allegations in complainant's bill that no valid location notice was ever posted upon the surface of said claim, or recorded in the recorder's office of the proper county, as required by law.

3. Because it does not appear from said bill that complainant and

his co-locators ever did the work required by law to be done within three months after taking possession of said claim, or otherwise complied with the requirements of the law, as to perfecting mining locations.

4. Because the agreement alleged to have been made be-
24 tween complainant and said Johnson with one Pilkey was subject to revocation by either party thereto at any time and the facts alleged in the bill amounted to an abandonment of said alleged Sampson claim under the terms of said alleged agreement.

5. Because it does not appear from said bill when the complainant acquired an undivided interest in said alleged grant with the heirs of Antonio Lucero, deceased, or what the nature, extent and amount of said interest is, or through what *mean* conveyance it was acquired.

6. Because it does not appear that at the time the alleged entry by defendants Fagley, Walker, Leeds and Johnson was made on said mining claim, that the complainant or his co-locators under the alleged Sampson location were in possession of the said mining claim, or any part thereof or had any lawful right to the possession thereof.

7. Because it does not appear from the allegations in said bill that the defendants are not co-tenants with the heirs of Antonio Lucero, deceased, and have a larger interest and a better right to the possession of the surface ground of said claim than the complainant.

8. Because ownership in said alleged grant confers no interest in the mineral thereon, or the right to mine the same.

9. Because the complainant's remedy is at law and the bill does not state a case for the court of equity.

Wherefore these defendants demur to said bill and to all the matters and things contained therein and pray the judgment of this honorable court, whether they shall be compelled to make any further or other answer thereto; and pray to be dismissed with their reasonable costs in this behalf sustained,

25 (Signed) CHILDERS & DOBSON,
W. C. HEACOCK,
Att'ys for Def'ts.
W. B. CHILDERS,
E. W. DOBSON,
In Their Own Proper Persons.

W. B. Childers, of lawful age, counsel for defendants, certifies that the foregoing demurrer is, in his opinion, well founded in point of law.

(Signed) W. B. CHILDERS.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

W. B. Childers, being duly sworn, upon oath deposes and says that he is a counsel for the defendants for whom the foregoing demurrer is filed, and that said demurrer is not interposed for delay.

(Signed) W. B. CHILDERS.

Subscribed and sworn to before me this 11th day of July, A. D. 1894.

(Signed) E. W. DOBSON,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed: No. 3888. District court, Bernalillo county. Henry Lockhart *vs.* H. C. Leeds *et al.* Demurrer. Filed in my office this 12th day of Jul-., 1894. O. N. Marron, clerk. Childers & Dobson and W. C. Heacock, sol's for def'ts.)

And thereafter, to-wit, on the 14th day of July, 1894, there was filed in the office of the clerk of said court, in said cause, the subpœna in chancery and return of subpœna in chancery, which said subpœna in chancery and return is in words and figures following, to-wit:

The Territory of New Mexico to H. C. Leeds, J. A. Johnson, Julia A. Johnson, J. Q. Wills, Charles Pilkey, Frank Fagaly, Lee
26 Walker, Chas. Bonsall, receiver; William B. Childers, and Edward W. Dobson, Greeting:

You and each of you are hereby commanded: That laying all other matters and things aside, you do cause an appearance to be entered for you in the district court for the county of Bernalillo, in the second judicial district of the Territory of New Mexico, in chancery sitting on the first return day occurring not less than twenty days after service hereof, if the defendants served are residents of said judicial district, or on the first return day occurring not less than thirty days after service hereof, if the defendants served are not resident- of said judicial district, then and there to answer unto a bill filed against you by Henry Lockhart, and that you do answer, concerning such things as shall then and there be alleged against you, and observe what the said court shall direct in this behalf, on pain of an attachment being issued against your person, and such other process of contempt as said court shall award; the first Monday in each month being a return day and each defendant being required to enter his appearance in the office of the clerk of said court on or before the return day on which this writ is returnable, otherwise the bill herein may be taken *pro confesso*.

Witness the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, and the seal of said district court, this 18th day of June, A. D. 1894.

(Signed) O. N. MARRON,
[SEAL.] *Clerk and Register.*

This is a suit in equity; the complainant prays in and by
27 his bill filed in this cause that the receiver be appointed to take possession of the certain mining claim in the Cochiti mining district of the county of Bernalillo, described in the bill of complaint herein; and to keep and hold possession thereof under

the order of the court, and that the location notice of the mining claim in the said district called and known as the Washington in the name of the defendants, Frank Fagaly, Lee Walker, H. C. Leeds, and J. A. Johnson, be decreed to be void and of no effect against complainant, and that the said defendants be enjoined from mining, working or removing from the said Washington lode any ore or mineral and that complainant be decreed to be the owner of the said ore and mineral contained therein and entitled to the possession of the same and for general relief.

Respondents are notified that the first Monday of each month is a return day for process and that they are required to enter their appearance in the office of the clerk and register in chancery of the court on or before the return day of this writ or a decree *pro confesso* may be entered herein against them.

(Signed) O. N. MARRON,
Clerk and Register in Chancery.

TERRITORY OF NEW MEXICO, } *ss:*
County of Bernalillo, }

I hereby certify that I served the within subpœna on the defendant Frank Fagaly by delivering a true copy thereof to him personally on the 26th day of June, A. D. 1894, at the city of Albuquerque.

Dated June 27th, 1894.

(Signed) J. YRISARRI, *Sheriff,*
(Signed) By T. S. HUBBELL,
Deputy Sheriff.

TERRITORY OF NEW MEXICO, } *ss:*
County of Bernalillo, }

28 I hereby certify that I served the within subpœna on the defendant Charles Pilkey by delivering a true copy thereof to him personally on the 10th day of July, 1894.

Dated 10th day of July, 1894.

(Signed) J. YRISARRI, *Sheriff,*
(Signed) By J. FRANK WILL,
Deputy Sheriff.

(Endorsed: No. 3888. In the district court, Territory of New Mexico, county of Bernalillo. Henry Lockhart *vs.* H. C. Leeds *et al.* Subpœna in chancery. Warren, Fergusson and Bruner, attorneys for plaintiff, original. Filed in my office this 14th day of Jul-, 1894. O. N. Marron, clerk.)

And thereafter, on to-wit, the 9th day of October, 1894, there was filed in the office of said clerk, in said cause, a notice by defendants that demurrer will be called for argument at a certain date, which said notice is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo.

In the District Court.

HENRY LOCKHART
vs.
H. C. LEEDS ET AL.

In the Matter of the Demurrer to the Bill of Complaint of H. C. Lockhart.

Messrs. Warren and Fergusson:

You are hereby notified that at the incoming of the court on Friday, the 12th day of October, A. D. 1894, we will ask leave of the court to call up for argument, at that time, the demurrer as filed to the said bill of complaint.

(Signed) CHILDERS & DOBSON,
W. C. HEACOCK,
Attorneys for Walker, Leeds, Johnson, and Wills.

29 (Endorsed: No. 3888. Territory of New Mexico, county of Bernalillo, in the district court. Henry Lockhart *vs.* H. C. Leeds *et al.* Childers & Dobson and W. C. Heacock, attorneys for Walker, Leeds, Johnson and Wills. Filed in my office this 9th day of October, 1894. O. N. Marron, clerk.)

And thereafter, on, to-wit, the 4th day of February, 1895, there was an order duly made and entered of record in the said cause, sustaining defendants' demurrer to the bill of complaint, which said order is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo.

In the District Court.

HENRY LOCKHART
vs.
H. C. LEEDS ET AL.

This cause coming on to be heard upon the demurrer interposed by defendants to the bill of complaint in this cause, and after argument of counsel for respective parties, and the court being fully advised in the premises, doth sustain the said demurrer and dismisses complainant's bill, with leave on the part of said complainant to file an amended bill within twenty days.

(Signed) N. C. COLLIER, *Judge.*

(Endorsed: No. 3888. Henry Lockhart *vs.* H. C. Leeds *et al.* Order sustaining demurrer. Filed in my office this 4th day of Feb., 1895. O. N. Marron, clerk.)

And thereafter, on, to-wit, the 18th day of February 1895, there was filed in the office of the clerk of said court, in the said cause, a petition of complainant to revive cause, etc., which said petition is in words and figures *as* following, to-wit:

In the District Court, Second Judicial District, Bernalillo
30 County, New Mexico, Honorable N. C. Collier, Presiding Judge, etc.

HENRY LOCKHART
vs.
H. C. LEEDS ET AL. } No. 3888. Chancery.

To the Honorable N. C. Collier, judge of said district court:

Henry Lockhart, the complainant in the above entitled cause respectfully states that the defendant Frank Fagaly departed this life in the county of Bernalillo on, to-wit, the 3rd day of February, A. D. 1895, and that the said Frank Fagaly, in his life time, sold, transferred and conveyed all his right, title and interest in and to the said mining property in complainant's bill mentioned and called and known as the Washington lode, being the same mining property in said bill mentioned and described as the Sampson mine, to one Samuel Dunlap, a resident of said county of Bernalillo, and the complainant moves the court for a conditional order that the said action be revived against the said Samuel Dunlap as the successor in interest of the said Frank Fagaly, deceased, as defendant in said cause; and complainant moves the court that the time heretofore allowed him in which to file an amended bill of complaint in said cause be extended until the first day of the next March term of this court, being March 4th, 1895, and including said day.

(Signed) WARREN & FERGUSSON,
Sols. for Complainant.

(Endorsed: No. 3888. Filed in my office this 18th day of Feb., 1895. O. N. Marron, clerk.)

And thereafter, on the 18th day of February, 1895, there was an order of conditional revivor duly made and entered of record
31 in the said cause, which said order is in words and figures following, to-wit:

HENRY LOCKHART
vs.
H. C. LEEDS ET AL. } No. 3888. Chancery.

Upon the reading and filing the petition of Henry Lockhart suggesting the death of the respondent Frank Fagaly, and petitioning that this cause be revived against Samuel Dunlap as the successor in interest of the said Frank Fagaly,

It is ordered, adjudged and decreed by the court that a rule issued on the said Samuel Dunlap that he show cause before the court on

the first day of next March, 1895, term thereof, why this cause should not be revived against him, the said Samuel Dunlap as the successor in interest of the said Frank Fagaly, deceased.

It is further ordered that the time heretofore allowed complainant to file an amended bill of complaint be and it hereby is extended to the 1st day of the next March, 1895, term of the court, and including said day.

(Signed) N. C. COLLIER, *Judge.*

And thereafter, on, to wit, the 4th day of March, 1895, there was filed in the office of the clerk of the said court a certified copy of conditional order of revivor, theretofore issued, together with the sheriff's return thereon, which said order and return, are in words and figures, following, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

HENRY LOCKHART }
vs. } No. 3888. Chancery.
H. C. LEEDS ET AL. }

Upon the reading and filing the petition of Henry Lock-
32 hart, suggesting the death of the respondent, Frank Fagaly, and petitioning that this cause be revived against Samuel Dunlap as the successor in interest of the said Frank Fagaly;

It is ordered, adjudged and decreed by the court that a rule issue on the said Samuel Dunlap that he show cause before the court on the first day of the March, 1895, term thereof why this cause should not be revived against him, the said Samuel Dunlap, as the successor in interest of the said Frank Fagaly, deceased.

(Signed) N. C. COLLIER, *Judge.*

TERRITORY OF NEW MEXICO, }
Second Judicial District, County of Bernalillo, } *ss:*

I, O. N. Marron, clerk of said court, do hereby certify that the above and foregoing is a true, correct and complete copy of an original order in the above entitled cause in the matter of the revival of this cause against Samuel Dunlap, made and entered of record on the 18th day of February, 1895, as the same appears of record in my said office.

Witness my hand and the seal of said court this 25th day of February, 1895.

[SEAL.] (Signed) O. N. MARRON, *Clerk.*

(Endorsed:) I, Charles F. Hunt, sheriff of Bernalillo county, New Mexico, certify that I have served this order on the within named Samuel Dunlap, on the 25th day of February, 1895, at said county

of Bernalillo, by then and there delivering a true copy of the same to Samuel Dunlap. (Signed) Charles F. Hunt, sheriff of Bernalillo county. (Signed) By T. S. Hubbell, deputy sheriff.

33 *Fees.*

Service	$1.00
Mileage, (4 miles)	.32
Return	.50
	$1.82

(Endorsed: No. 388–. District court Bernalillo county. Henry Lockhart *vs.* H. C. Leeds, *et al.* Conditional order revivor—original. Filed in my office this 4th day of March, 1895. O. N. Marron, clerk.)

And thereafter, on, to-wit, the 4th day of March, 1895, there was filed in the office of the clerk of the said court in the said cause, an amended bill of complaint and exhibits thereto attached, which said amended bill of complaint is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO, } *ss*:
County of Bernalillo, }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo for the Trial of Causes Arising under the Laws of the Territory of New Mexico, in Chancery Sitting.

To the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the said district court:

Henry Lockhart, a resident of the county of Bernalillo, and Territory of New Mexico by leave of court files this his amended bill of complaint against, and complains of H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, Charles Pilkey, Samuel Dunlap, Lee Walker, William B. Childers, Edward Dobson, and Charles Bonsall, receiver, impleaded with said defendants by leave of court first had and obtained, all residents of the said county of Bernalillo,
34 defendants in this cause, and humbly complaining, shows unto your honor, that heretofore, to-wit, on the 7th day of May, 1893, a certain agreement in writing bearing said date was made and entered into by and between your orator and one Benjamin Johnson, by the name and description of Benj. Johnson, with the defendant Charles S. Pilkey, a copy whereof is herewith filed, marked "Exhibit A," and made a part of this your orator's bill of complaint, wherein and whereby said Pilkey contracted and agreed with your orator and the said Benjamin Johnson to enter into a co-partnership with them for the purpose of discovering, locating,

and operating mining claims; and it was thereby contracted and agreed by and between said parties that the said Pilkey should prospect and locate such veins, lodes or placers as he might discover or know the existence of, containing valuable ore or minerals, in the name of and for the joint benefit of all the said parties to said agreement in the proportion of one-third interest to said defendant Pilkey and an undivided two-thirds interest to your orator and the said Benj. Johnson; and your orator and the said Benj. Johnson thereby contracted, in consideration of the premises, to furnish to the said Pilkey at their expense the following articles and tools, viz: twenty-five pounds of giant powder, 100 feet of fuse, one box of caps, one hammer, — pounds of drilled steel and one pick; and when he should have sunk or driven a shaft or tunnel four feet by six feet from the lowest level of the surface at its mouth upon such vein and locality as should be designated by them, he should receive in addition to the above property the sum of thirty dollars, less any money for provisions or other articles, except these
35 above named, which should be furnished to him by them prior to the completion of said work; and it was thereby further contracted and agreed that said work should begin within twenty days from the date of the said agreement and should be prosecuted with due diligence to completion and to the satisfaction of the orator and the said Johnson, and that the said Pilkey should furnish to them from time to time at their request samples of all ores and minerals which should be discovered or taken out of any workings by the said Pilkey; and it was thereby further contracted and agreed that it should be at the option of your orator and the said Benjamin Johnson to continue working or abandon any claim located in pursuance with said agreement, at any time they might deem proper and that the said agreement should continue in force and effect for one year from its date and that all discoveries or locations made during that time by said Pilkey should be included and covered by the said agreement; and it was thereby further contracted and agreed that the said Pilkey should have no power to create any debt or make any contract binding the said other parties to said agreement unless by them authorized in writing so to do; and that any concealment by or on the part of the said defendant Pilkey of any discovery by him made or failure upon his part to locate any valuable mineral claim or claims for the purpose of evading the terms of the said agreement, and defrauding your orator and the said Benjamin Johnson, should work a forfeiture of any right or interest, direct or indirect, that the said Pilkey might have or afterwards obtain, to and for the benefit of your orator and the said Benjamin Johnson.

36 And your orator states that the agreement aforesaid was duly subscribed, executed and delivered by and between the said parties thereto and your orator and the said Benjamin Johnson then and there delivered the said articles and provisions and paid the said money to and for the said Pilkey, and in all respects kept

and performed the terms of the said agreement upon their part, and were at all times thereafter ready and willing and offered so to do.

Your orator further states that, at and prior to the date of said agreement, the said parties thereto had knowledge or information of the existence of valuable mineral deposits in the northeasterly portion of the said county of Bernalillo, in the vicinity of the town called Cochiti, and that it was their purpose in pursuance of said agreement that the said Pilkey should prospect, search for, discover, locate and acquire title to the same for their joint use and benefit in the proportion and upon the terms therein set forth.

And your orator further states that, under and in pursuance of the terms of said agreement, the defendant Pilkey, did thereafter proceed to the aforesaid portion of said county, and did on or prior to the 10th day of July 1993, find and discover a certain valuable mineral bearing lead, lode, ledge, vein or deposit bearing gold and silver, and did then and there enter upon and take actual, full and peaceable possession of the same, for and on behalf of your orator and the said other parties to said agreement as claimants, discoverers and locators of the same under and in pursuance of the terms of the said agreement, and as evidence thereof, the said Pilkey then and there posted in a conspicuous place upon the said lead, lode, ledge, vein or deposit bearing mineral, a notice of the location thereof bearing
37 the said date, a copy whereof is herewith filed, marked "Exhibit B," and made a part of this your orator's bill of complaint, and marked the boundaries of the said claim upon the ground in such manner that the same could be readily traced and thereafter transmitted to your orator and to said Benjamin Johnson at their request samples of ores and minerals by him taken and extracted from the said mineral bearing lode, lead or ledge so by him discovered and taken possession of as before stated, and did thereafter, in pursuance of the direction of your orator and said Johnson commence to sink a shaft, or cut, upon said mineral bearing lode or ledge to the depth of ten feet from the lowest rim thereof, and your orator is informed and believes and so states that he did so sink said shaft or cut thereupon to mineral in place disclosing a large and valuable deposit of gold and silver bearing ore in place within less than ninety days from the time of taking possession of said lode or ledge as aforesaid; and your orator states that they the said discoverers and locators of said mineral bearing lode or ledge, not then knowing whether the said mineral claim was situated upon public domain of the United States and was free and open to location under the mining laws of the United States, performed the required acts of location under said laws and the laws of this Territory, or were ready, able and willing so to do and would have so done except for the wrongful, fraudulent and unlawful acts of the defendants hereinafter mentioned.

Further complaining, your orator shows unto your honor that on or about October 1st, 1893, the defendant Pilkey, while so in possession of the said lead, lode or ledge, under and in pursuance of said

agreement, wrongfully and unlawfully, conspired, combined
38 and confederated with the defendants H. C. Leeds. J. A. Johnson, Frank Fagaly, and Lee Walker to defraud your orator and the said Benjamin Johnson of their interest in and title to the said mine and minerals discovered and possessed by them as aforesaid, and of which the said Pilkey was then in possession under the agreement aforesaid, and that in pursuance of said conspiracy and confederation, on, to-wit, October 1st, 1893, the precise date whereof being unknown to your orator, and agreement was made and entered into by the defendants Fagaly, J. A. Johnson, Walker and Leeds, the defendant Julia Johnson being a party to and having some interest under the said agreement, and the defendant Pilkey, being a party thereto, by which it was agreed that the said Pilkey in violation and fraud of the rights of your orator in and to the said mine of which he was then in possession as aforesaid, by him discovered and held under said agreement, should transfer, convey and deliver possession of said mine to the last named defendant without the knowledge or consent of your orator and the said Johnson, and that they should do and perform all other acts deemed necessary for that purpose; and complainant states that the said complainant by an instrument in writing the precise terms of which are unknown to complainant the same being in possession of defendants or some of them, sold, transferred and conveyed to the defendants Fagley, J. A. Johnson, Leeds and Walker an undivided four-fifths interest in said mine and mineral, the said Pilkey retaining an undivided one-fifth interest therein, which was conveyed to said Walker by said instrument and by him held in trust for said Pilkey and in pursuance of said fraudulent
39 combination and conspiracy, the defendants Frank Fagaly, J. A. Johnson, Lee Walker, and H. C. Leeds, together with the defendant J. Q. Wills, caused and procured the defendant Pilkey to stop work upon the said mines under his said agreement and to fail and neglect to record the said location notice, so by him posted thereon as aforesaid, and the said defendants or some of them wrongfully removed the said location notice from said claim and said defendants covered up or concealed the said workings thereon, heretofore done and performed by defendant Pilkey as aforesaid, and entered into and upon the said lead, lode, ledge and deposit bearing gold and silver, mentioned and described in the location notice heretofore described as the "Sampson" mine, and denied and still deny that your orator had or has any interest therein and thereafter, having so procured possession of the same, the said defendants in pursuance of said confederacy, caused to be posted upon said mine a location notice, and filed the same for record in the recorder's office of said county on, to-wit, December 30th, 1893, and caused the same to be there recorded in Book E, page 576, of mining records and a copy whereof is herewith filed, marked "Exhibit C," and made a part of this bill, and thereby the said defendants claim to have located the said lead, lode or ledge bearing gold and silver and other minerals, so first discovered, located and held by the said

Pilkey, and described in the said location notice by him thereon posted as aforesaid as the "Sampson mine" for the benefit of themselves as locators under the mining laws of the United States and called and designated the same as the "Washington" lode, and it was agreed in pursuance of said confederacy and for the pur-
40 pose of concealing from your orator the interest of said Pilkey in said pretended location that each of the four last named defendants should be entitled to a one-fifth interest in said mine, and the said Pilkey should be entitled to the remaining one-fifth, but that said last named interest should be claimed and held by said Walker in trust for said Pilkey.

Your orator further states that the said Benjamin Johnson has since conveyed to him all his interest in and to the said Sampson location and mine, and your orator has become and now is the owner of the title and interest of the said Benjamin Johnson.

Further complaining your orator states upon his information and belief that the said mine called and known as the "Sampson" mine is situated within the exterior boundaries of a tract of land claimed to have been granted, on August 2nd, A. D. 1728, by the then governor and captain general of New Mexico, under the Crown of Spain, to one Antonio Lucero, and that the same at date of discovery of the said mines by said Pilkey was and now is claimed by certain persons under the said alleged grant, and claims therefore under said grant were at the date of said discovery, and now are pending in the United States Court of Private Land Claims and are undetermined, but your orator is advised by counsel and believes and so states the fact to be that the said alleged grant to the said Antonio Lucero did not effect the donation of sale of the said lode, ledge, or vein bearing gold and silver, so discovered and held by the said Pilkey and called and known as the "Sampson" mine, and that the said Antonio Lucero has not nor have his heirs, representatives or successors had not in any manner nor have they since become entitled in law or in equity to the gold, silver or mineral contained in the said
41 lead, lode or ledge, called and known as the "Sampson" mine; and your orator avers that by virtue of the said prior discovery, possession, working and location of the said mine by said Pilkey acting under the agreement before mentioned, your orator became and now is equitably entitled to the said gold, silver and mineral therein contained and in equity and good conscience has prior and paramount right and title in and to the same.

Your orator further states that the respective defendants, Wills, Childers, Dobson and Dunlap, claim some right or interest in and to the said pretended mining location called and known as the Washington mine derived under or through some of the said other defendants but your orator states that the said Wills and the said Leeds, J. A. Johnson, Julia Johnson and Walker, at and prior to the time of acquiring any interest in said mine, had full notice and knowledge of the rights of your orator and Benjamin Johnson in and to said mineral deposit and of their said agreement with said Pilkey hereinbefore mentioned. Your orator is advised and so

states that the said mineral deposits so discovered by said Pilkey as aforesaid was not and is not subject to location as a mining claim under and in pursuance of the laws of the United States, for the reason that the same is situated as aforesaid within the said alleged private land grant of the said Antonio Lucero, but your orator states that by virtue of the said prior discovery, possession and work of the said lode or mine by the said Pilkey under said agreement he became and was and now is equitably entitled to the said gold silver and minerals, contained in said location called the Sampson mine as against the said defendants or any other person or persons
42 whomsoever, except the Government of the United States and is equitably entitled to the first and preferential right to acquire the legal right thereto from the United States.

Your orator further states that under and by virtue of mesne conveyances your orator has acquired an undivided title and interest as a tenant in common with the other heirs and representatives of said Antonio Lucero in and to the said land included in said alleged grant to said Antonio Lucero, and is lawfully entitled to enter upon and work the said mine.

Your orator further states that theretofore the defendant Charles Bonsall in a certain cause pending in this court wherein the defendant James Q. Wills was and is complainant and the defendants Leeds, J. A. Johnson, and Julia Johnson, Wills, Fagaly, Walker and Pilkey, together with one T. B. Mills and J. T. Dougine were and are defendants, was appointed by this honorable court as receiver of the said alleged Washington lode, under the said pretended location thereof by defendants Leeds, J. A. Johnson, Fagaly, Walker and Pilkey, under the name of the "Washington" mine, and that the said Bonsall in pursuance of said order of appointment has entered upon and taken possession of the said Sampson mine and now holds possession of the same as such receiver.

Your orator further states that after the removal by said defendants of the said location notice posted as aforesaid by said Pilkey of the said "Sampson mine" a copy thereof was procured by your orator, of which "Exhibit C" filed herewith is a copy and the same was recorded in the office of the recorder of said county, on December 9th, 1893, in volume F of mining records of said county, folio 7.

43 Your orator further states that by virtue of the premises he became and was and now is the equitable owner of the said mine and gold and silver ores therein contained so discovered, possessed and located by the said Pilkey under the said agreement, and is equitably entitled as against the said defendants to the possession and enjoyment of the same and to the preferential right to acquire the legal title to the same from the United States, and that the said pretended location thereof under the name of the Washington mine by and in the names of defendants Leeds, J. A. Johnson, Fagaly and Walker, was and is wholly inoperative and void, and that the defendant Charles Pilkey by reason of his participation in the said fraudulent conspiracy, combination and acts with

said other defendants, under and in pursuance of the terms of your orator's said agreement with him, has forfeited all right or interest direct or indirect in and to the said Sampson mine and your orator is equitably the owner of and entitled to the same, and your orator had well hoped that the said defendant- would recognize the prior right and title in and to the same and surrender possession to the same and release all claims thereto to your orator, but now so it is that said defendants excepting defendant Bonsall as receiver, combining and confederating together as aforesaid give out and claim in speeches that the said pretended location and location notice of the said alleged "Washington" lode by the said defendants was and is a valid location as against your orator and that your orator has no title or interest in and to the said mine bearing gold, silver and other minerals, so discovered, possessed and located as the "Sampson mine" by the defendant Pilkey as hereinbefore set forth, and
44 refused to permit your orator to enter upon the said property or to work the same or exercise any acts of possession or ownership thereof, and the defendants respectively claim title to said mining property under and by virtue of said transfer and conveyance from said Pilkey and said pretended location of said Washington lode hereinbefore mentioned.

Your orator therefore prays that the said H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, J. Q. Wills, Charles Pilkey, Samuel Dunlap, Lee Walker, William B. Childers, Edward Dobson and Charles Bonsall, receiver as aforesaid, to your orator's amended bill of complaint, be required to full, true and perfect answers make to all and singular the allegations of this bill, but without oath, their respective answers under oath being hereby waived, and that the receiver be appointed to take possession of the lead, lode, ledge or deposit, bearing gold, silver and other metals, situated within the mining claim or location, in the Cochiti mining district, Bernalillo county, New Mexico, called and known as the "Sampson" mine and mentioned and described in the location notice thereof made by Charles Pilkey, Ben. Johnson and Henry Lockhart, dated July 10th, 1893, and recorded in vol. 5 of mining records of said county, folio 7, on December 9th, 1893, to keep and hold possession thereof until the further order of this court, and that the said transfer and conveyance executed by said Pilkey to said Fagaly, Leeds, J. A. Johnson and Walker be decreed fraudulent and void as against your orator and the *said* be cancelled and annulled, and that the location and location notice of the said "Washington" lode by and in the name — Frank Fagaly, Lee Walker, H. C. Leeds,
45 and J. A. Johnson be decreed to be void and of no effect as against your orator, and that the said defendants be enjoined from mining, working or removing from the said "Washington" lode any ore or mineral and your orator be decreed to be the equitable owner of the said ore and mineral contained therein and entitled to the prior and preferential right to acquire the legal title thereto from the United States, by virtue of the said prior discovery

and appropriation thereof by said Pilkey and for such other and further relief as may be equitable and proper in the premises.

And your orator prays as by his original bill of complaint, he has already prayed.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Henry Lockhart, being duly sworn says that he is the complainant in the above and foregoing amended bill of complaint, by him subscribed, and has heard read and knows the contents thereof and the matters and things therein contained are true of his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes them to be true.

(Signed) HENRY LOCKHART.

Subscribed and sworn to before me this 2nd day of March, A. D. 1895.

(Signed) FLORENCE S. SCOTT,
Notary Public.
[NOTARIAL SEAL.]

et al. Amended bill of complaint. Filed in my office this 4th day of March, 1895. O. N. Marron, clerk.)

"EXHIBIT A."

Articles of Agreement.

46 For and in consideration of the sum of one dollar to him in hand paid, the receipt of which is hereby acknowledged, Charles Pilkey, party of the first part, agrees with Henry Lockhart and Benjamin Johnson, parties of the second part, all of whom are residents of Bernalillo county, New Mexico, to enter into a partnership for the purpose of discovering, locating and operating mining claims.

The considerations of this agreement are that the said first party shall prospect and locate such veins and lodes and placers as he may discover or know the existence of containing valuable ores or minerals in the name of and for the joint benefit of all the parties hereto; in the proportion of one-third interest to said first party and an undivided two-thirds interest to the second parties.

The said second parties are to furnish the said first party at their expense with the following articles and tools, viz:

Twenty-five pounds of giant powder, 100 feet of fuse, one box of caps, one hammer, — lbs. of drill steel, and one pick, and when he shall — sunk or driven a shaft or tunnel four feet by six feet in a vein of mineral bearing quartz to a depth of twenty feet from the lowest level of the surface at its mouth, such vein and locality to be designated by said second parties, he shall receive in addition the sum of thirty dollars, less any moneys or provisions or other articles except as above enumerated.

Said work to be begun within twenty days from the date of this agreement and prosecuted with due diligence to the completion and to the satisfaction of the said second parties. The said first party to furnish the second parties from time to time at their request samples of all ores and minerals discovered or taken out of any workings.

47 It shall be at the option of the said second parties to continue working or abandon any claim located at any time they deem proper. This agreement to continue in force and effect for one year from its date, all discoveries or locations made during that time by said party to be covered by this agreement. The said first party has no power to create any debt or make any contract binding the second parties to this agreement unless authorized to do so in writing by the said second parties. Any concealment of a discovery or failure to locate of a valuable mineral claim or claims for the purpose of evading the terms of this agreement and defrauding the said second parties shall work a forfeiture of any right or interest, direct or indirect, that such first party might have or afterwards obtain to and for the benefit of the said second parties.

Dated May 7th, 1893.

(Signed) CHARLES PILKEY. [SEAL.]
" HENRY LOCKHART. [SEAL.]
" BENJ. JOHNSON. [SEAL.]

Witness:
W. C. HEACOCK.

(Endorsed on back: "Article of agreement—Charles Pilkey and Lockhart and Johnson." Also seal and certificate of recordation, signed by J. W. Harris, recorder, that same was filed for record on the 7th day of December, 1893, at 11 o'clock a. m. in vol. E. of mining records of Bernalillo county, page 562.)

"EXHIBIT B."

The undersigned, —— ——, citizens of the United States, over the age of 21 years, having complied with all the re-
48 quirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs, and regulations in force relative to such locations, have located and do hereby claim by right of discovery and location fifteen hundred (1500) linear feet on and along this lode, vein, deposit of mineral bearing rock in place, together with three hundred (300) feet of surface ground along and on each side of said 1500 feet. The claim hereby located is situate in the Cochiti dis. mining district, county of Bernalillo, Territory of New Mexico, and is more particularly described as follows:

Beginning at the monument of stones (monument No. 1) erected on said lode, lead and deposit, said monument No. 1 being the north end monument of this claim, and being the center of the

north end line of said claim; thence west 300 feet to a monument of stones (No. 2); thence south 1500 feet to a monument of stones (No. 3); thence east 300 feet to a monument of stones (No. 4), said monument No. 4 being the south end monument and the center of the south end line of this claim; thence east 300 feet to a monument of stones (No. 5); thence north 1500 feet to a monument of stones (No. 6); thence west 300 feet to the place of beginning.

And for further description the lode is of grayish quartz from three to five feet wide, and can be traced for (1000) yards, dips into the mountain.

This claim was located July 10th, A. D. 1893, and shall be known as the "Sampson mine." A copy of this notice is placed on monument No. — in the center of claim by a pine tree with bark off on south side.

CHARLES PILKEY,
BEN. JOHNSON,
HENRY LOCKHART,
Locators.

49

Notice posted on claim in presence of—
IDA PILKEY,
LEE DUDLEY,
Witnesses.

(Endorsed: Name of claim, "Sampson mine." Names of locators, Charles Pilkey, Ben. Johnson, Henry Lockhart. Territory of New Mexico, county of Bernalillo, *ss:* I hereby certify that this instrument was filed for record on the 9th day of December, A. D. 1893, at 11 o'clock a. m., and recorded December 19th, A. D. 1893. J. W. Harris, recorder.)

"EXHIBIT C."

Notice of Location.

The undersigned, citizens of the United States, over the age of twenty-one years, having complied with all the requirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs and regulations in force relative to such locations, have located, and do hereby claim by right of discovery and location 1500 linear feet on and along this lode, vein, deposit of mineral bearing rock in place, together with 300 feet of surface ground along and on each side of said 1500 feet.

The claim hereby located is situated in the Cochiti mining district, county of Bernalillo, New Mexico, and more particularly described as follows:

Beginning at a post No. 1 erected on said lode, lead and deposit, said post being the north end center monument of this claim, and being the center of the north line of said claim marked
50 ("north end center post"); thence east 300 feet to the northeast corner post No. 2, marked "northeast corner post;" thence south

1500 feet to post No. 3, southeast corner post, "marked "southeast corner post;" thence east 300 feet to post No. 4, marked "south end center post;" thence 300 feet to post No. 5, marked "southwest corner post;" thence north 1500 feet to post No. 6, marked "northwest corner post;" thence east 300 feet to the place of beginning. All of said marks being in pencil, and the discovery shaft of said claim being located within the exterior lines thereof and on the lode or lead located and upon which said discovery shaft is posted a copy of this notice of location, and in the monument of stones around all of said post referred to are piles of stones.

Said claim being about two miles north of Peralta mountain, Cochiti mining district, Bernalillo county, New Mexico.

This claim is located in the said mining district, about 60 feet from the north end center where location line paper is nailed to pine tree about 60 feet south of north end center line. Direction from a big pine tree marked with a blaze.

This location is an amended location of said claim, the original thereof having been made on the 20th day of October, A. D. 1893. Said claim shall be known as the "Sunny South lode." Located by F. Fagaly, J. A. Johnson, H. C. Leeds, Lee Walker, locators.

Filed for record December 30th, 1893, at 10 a. m., and recorded January 15th, 1894.

"EXHIBIT C."

The undersigned, —— —— citizens of the United States
51 and over the age of twenty-one years, having complied with all requirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs and regulations in force relative to such locations, ha- located, and do hereby claim the right of discovery and location, fifteen hundred (1500) linear feet on and along this lode, vein, deposit of mineral bearing rock in place, together with three rundred feet of surface ground along and on each side of said 1500 feet. The claim hereby located is situate in the Cochiti mining district, county of Bernalillo, Territory of New Mexico, and is more particularly described as follows:

Beginning at a monument of stones (monument No. 1), erected on said lode, lead and deposit; said monument No. 1 being the north end monument of this claim and being the center of the north end line of said claim; thence west 300 feet to a monument of stones (No. 2); thence south 1500 feet to a monument of stones (No. 3); thence east 300 feet to a monument of stones (No. 4), said monument No. 4 being the south end monument and the center of the south end line of this claim; thence 300 feet to a monument of stones (No. 5); thence north 1500 feet to a monument of stones (No. 6); thence west 300 feet to the place of beginning.

And for further description the lode is of grayish quartz, from three to five feet wide, and can be traced for 1000 yards. Dips into the mountain.

This claim was located July 10th, A. D. 1893, and shall be known as the Sampson mine. A copy of this notice is placed on monument No. — in the center of the claim by a pine tree with bark off on the south side.

CHAS. PILKEY,
BEN JOHNSON,
HENRY LOCKHART,
Locators.

52

Notice posted on the claim in presence of

ADA PILKEY,
LEE DUDLEY,
Witnesses.

(Endorsed on back: Notice of mining location. Name of claim, "Sampson." Name of locators, Charles Pilkey, Ben Johnson, Henry Lockhart. Filed for record this — day of ——, A. D. 189–. —— ——, recorder. Territory of New Mexico, county of Bernalillo. This instrument was filed for record on the 9th day of December, 1893, at 11 o'clock a. m. Recorded in volume F of mining records of said county, folio 7. J. W. Harris, recorder.)

And thereafter, on, to-wit, the 14th day of March, 1895, there was filed in the office of the clerk of said court, in said cause, complainant's consent for extension of time to answer, etc., which said consent is in words and figures following, to-wit:

COUNTY OF BERNALILLO, *ss:*

In the District Court.

HENRY LOCKHART
vs.
H. C. LEEDS ET AL.

Complainant in the above entitled cause, by Warren & Fergusson, his solicitors, hereby consents that the defendants may have until March 18th, within which to answer, the demurrer or plead to the amended bill of complaint filed in the above cause.

(Signed) WARREN & FERGUSSON,
Solicitors for Complainant.

(Endorsed: 3888. Henry Lockhart *vs.* H. C. Leeds *et al.* Filed in my office this 14th day of March, 1895. O. N. Marron, clerk.)

And thereafter, on, to-wit, the 16th day of March, 1895,
53 there was filed in the office of the said clerk of the said court defendants' demurrer to amended bill of complaint, which said demurrer is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court, Second Judicial District.

HENRY LOCKHART, Complainant,
vs.
H. C. LEEDS, J. A. JOHNSON, JULIA A. JOHNSON, J. Q. WILLS, Charles Pilkey, Samuel Dunlap, Lee Walker, Chas. Bonsall, E. W. Dobson, and W. B. Childers, Defendants.

And now come the above named defendants, H. C. Leeds, J. A. Johnson, Julia A. Johnson, and J. Q. Wills, and Chas. Bonsall, by their solicitors, Childers W. B., and E. W. Dobson, and the defendants Chas. Pilkey and Lee Walker, by their solicitor, W. C. Heacock, and defendants W. B. Childers and E. W. Dobson, in their own proper persons, by protestation, not confessing or acknowledging any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth, and alleged; and demur to said amended bill and for cause of demurrer allege the following:

1. Because the bill does not allege that the defendants, Dunlap, Johnson, Leeds and Walker entered in and upon said mining claim at any time prior to the 10th day of October, 1893, that is to say, within three months after said mine is alleged to have been located under the name of Sampson.

2. Because it appears from the allegations in complainant's amended bill that no valid location notice was ever posted upon the surface of said claim, or recorded in the recorder's office of the proper county, as required by law.

54 3. Because it does not appear from said amended bill that complainant and his co-locators ever did the work required by law to be done within three months after taking possession of said claim, or otherwise complied with the requirements of the law, as to perfecting mining locations.

4. Because the agreement alleged to have been made between complainant and said Johnson with one Pilkey was subject to revocation by either party thereto at any time and the facts alleged in the amended bill amounted to an abandonment of said alleged Sampson claim under the terms of said alleged agreement.

5. Because it does not appear from said amended bill when the complainant acquired an undivided interest in said alleged grant with the heirs of Antonio Lucero, deceased, or what the nature, extent and amount of said interest is, or through what mean conveyance it was acquired.

6. Because it does not appear that at the time the alleged entry by defendants Dunlap, Walker, Leeds and Johnson was made on said mining claim, that the complainant or his co-locators under the alleged Sampson location were in possession of the said mining claim, or any part thereof or had any lawful right to the possession thereof.

7. Because it does not appear from the allegations in said amended bill that the defendants are not co-tenants with the heirs of Antonio Lucero, deceased, and have a larger interest and a better right to the possession of the surface ground of said claim than the complainant.

55 8. Because ownership in said alleged grant confers no interest in the mineral thereon, or the right to mine the same.

9. Because the complainant's remedy is at law and the amended bill does not state a case for a court of equity.

Wherefore these defendants demur to said amended bill and to all the matters and things contained therein and pray the judgment of this honorable court, whether they shall be compelled to make any further or other answer thereto; and pray to be dismissed with their reasonable costs in this behalf sustained.

W. B. Childers, of lawful age, counsel for defendants, certifies that the foregoing demurrer is, in his opinion, well founded in point of law.

(Signed) W. B. CHILDERS.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

W. B. Childers, being duly sworn, upon oath deposes and says that he is a counsel for the defendants for whom the foregoing demurrer is filed, and that said demurrer is not interposed for delay.

(Signed) W. B. CHILDERS.

Subscribed and sworn to before me this 16th day of March, A. D. 1895.

(Signed) E. W. DOBSON,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed on back: No. 3888. District court. Henry Lockhart vs. H. C. Leeds *et al.* Demurrer to amended bill of complaint. Filed in my office this 16th day of March, 1895. O. N. Marron, clerk.)

And thereafter, on, to-wit, January 6th, 1896, there was filed in the office of the clerk of the said court, in the said cause, an amended second bill of complaint and exhibits attached thereto, which

56 said second amended bill of complaint is in words and figures following, to-wit:

In the District Court of the Second Judicial District, Sitting within and for the County of Bernalillo and Territory of New Mexico. Chancery.

To the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the said district court:

Henry Lockhart, a resident of the county of Bernalillo, and Territory of New Mexico, by leave of the court, files this his amended (second) bill of complaint against, and complains of H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, J. Q. Wills, Charles Pilkey, Samuel Dunlap, successor in interest of Frank Fagaly, deceased, the heirs and legal representatives of Lee Walker, deceased, William B. Childers and E. W. Dobson, and Charles Bonsall, receiver, impleaded with said defendants by leave of court first had and obtained, all residents of the said county of Bernalillo, defendants in this cause, and humbly complaining, shows unto your honor, that heretofore, to-wit, on the 7th day of May, 1893, a certain agreement in writing bearing said date was made and entered into by and between your orator and one Benjamin Johnson, by the name and description of Benj. Johnson, with the defendant Charles S. Pilkey, a copy whereof is herewith filed, marked "Exhibit A," and made a part of this your orator's bill of complaint, wherein and whereby said Pilkey contracted and agreed with your orator and the said Benjamin Johnson to enter into a co-partnership with them for the purpose of discovering, locating, and operating mining claims; and it was thereby contracted and agreed by and between
57 said parties that the said Pilkey should prospect and locate such veins, lodes or placers as he might discover or know the existence of, containing valuable ore or minerals, in the name of and for the joint benefit of all the said parties to said agreement in the proportion of one-third interest to said defendant Pilkey and an undivided two-thirds interest to your orator and the said Benj. Johnson; and your orator and the said Benj. Johnson thereby contracted, in consideration of the premises, to furnish to the said Pilkey at their expense the following articles and tools, viz: Twenty-five pounds of giant powder, 100 feet of fuse, one box of caps, one hammer, — pounds of drilled steel and one pick; and when he should have sunk or driven a shaft or tunnel four feet by six feet from the lowest level of the surface at its mouth upon such vein and locality as should be designated by them, he should receive in addition to the above property the sum of thirty dollars, less any money for provisions or other articles, except these above named, which should be furnished to him by them prior to the completion of said work; and it was thereby further contracted and agreed that said work should begin within twenty days from the date of the said agreement and should be prosecuted with due diligence to completion and to the satisfaction of the orator and the said Johnson, and that the said Pilkey should furnish to them from time to time at their request samples of all ores and minerals which should be dis-

covered or be taken out of workings by the said Pilkey; and it was thereby further contracted and agreed that it should be at the option of your orator and the said Benjamin Johnson to continue working or abandon any claim located in pursuance with said agreement, at any time they might
58 deem proper and that the said agreement should continue in force and effect for one year from its date and that all discoveries or locations made during that time by said Pilkey should be included and covered by the said agreement; and it was thereby further contracted and agreed that the said Pilkey should have no power to create any debt or make any contract binding the said other parties to said agreement unless by them authorized so to do; and that any concealment by or on the part of the said defendant Pilkey of any discovery by him made or failure upon his part to locate any valuable mining claim or claims for the purpose of evading the terms of the said agreement, and defrauding your orator and the said Benjamin Johnson, should work a forfeiture of any right or interest, direct or indirect, that the said Pilkey might have or afterwards obtain, to and for the benefit of your orator and the said Benjamin Johnson.

And your orator further states that the agreement aforesaid was duly subscribed, executed and delivered by and between the said parties thereto and your orator and the said Benjamin Johnson then and there delivered the said articles and provisions and paid the said money and divers other sums of money to and for the said Pilkey, and in all respects kept and performed the terms of the said agreement upon their part, and were at all times thereafter ready and willing and offered so to do.

Your orator further states that, at and prior to the date of said agreement, the said parties thereto had knowledge or information of the existence of valuable mineral deposits in the northeasterly portion of the said county of Bernalillo, in the vicinity of the town called Cochiti, and that it was their purpose in pursuance of
59 said agreement that the said Pilkey should prospect, search for, discover, locate and acquire title to the same for their joint use and benefit in the proportion and upon the terms therein set forth.

And your orator further states that, under and in pursuance of the terms of said agreement, the defendant Pilkey, did thereafter proceed to the aforesaid portion of said county, and did on or prior to the 10th day of July, 1993, find and discover a certain valuable mineral bearing lead, lode, ledge, vein or deposit bearing gold and silver, and did then and there enter upon and take actual, full and peaceable possession of fifteen hundred (1500) linear feet of, on and along the said mineral bearing lead, vein, or deposit, and also of three hundred (300) feet of surface ground along and on each side of said fifteen hundred (1500) feet, which was necessary and convenient for the mining and working of said mineral deposits which are respectively more particularly identified and described in the notice hereinafter mentioned; and posted thereon by said Pilkey,

and which is referred to and made a part of this bill for a more particular description, for and on behalf of your orator and the said other parties to said agreement as claimants, discoverers and locators of the same under and in pursuance of the terms of the said agreement, and as evidence of said discovery claim and possession said Pilkey then and there posted in a conspicuous place upon the said lead, lode, ledge, vein or deposit bearing mineral, a notice of the location and possession thereof bearing the said date, a copy whereof is herewith filed, marked "Exhibit B," and made a part of this your orator's bill of complaint, and marked the boundaries of the
60 said claim upon the ground in such manner that the same could be readily traced and thereafter transmitted to your orator and to said Benjamin Johnson at their request samples of ores and minerals by him taken and extracted from the said mineral bearing lode, lead or ledge so by him discovered and taken possession of as before stated, and did thereafter, in pursuance of the direction of your orator and said Johnson commence to sink a shaft, or cut, upon said mineral bearing lode or ledge to the depth of ten feet from the lowest rim thereof, and your orator is informed and believes and so states that he did so sink said shaft or cut thereupon to mineral in place disclosing a large and valuable deposit of gold and silver bearing ore in place within less than ninety days from the time of taking possession of said lode or ledge as aforesaid; and your orator states that they the said discoverers and locators and claimants of said mineral bearing lode or ledge, not then knowing whether the said mineral claim was situated upon public domain of the United States and was free and open to location under the mining laws of the United States, performed the required acts of location under said laws and the laws of this Territory, and were ready, able and willin- in all things to comply therewith, and would have so done except for the wrongful, fraudulent and unlawful acts of the defendants hereinafter mentioned.

Further complaining, your orator shows unto your honor that on or about October 1st, 1893, the defendant Pilkey, while so in possession of the said lead, lode or ledge, under and in pursuance of said agreement, wrongfully and fraudulently conspired, combined and confederated with the defendants H. C. Leeds,
61 J. A. Johnson, Frank Fagaly, and Lee Walker to defraud your orator and the said Benjamin Johnson of their interest in and title to the said mine and minerals discovered and possessed by them as aforesaid, and of which the said Pilkey, as the partner of and co-owner with your orator, was then in pursuance of said conspiracy and confederation, on, to-wit, October 1st, 1893, the precise date whereof being unknown to your orator, and agreement was made and entered into by the defendants Fagaly, J. A. Johnson, Walker and Leeds, the defendant Julia Johnson being a party to and having some interest under the said agreement, and the defendant Pilkey being a party thereto, by which it was agreed that the said Pilkey in violation and fraud of the rights of your orator in and to the said mine of which he was then in possession as afore-

said, by him discovered and held under said agreement, should transfer, convey and deliver possession of said mine to the last named defendant without the knowledge or consent of your orator and the said Johnson, and that they should do and perform all other acts deemed necessary for that purpose; and complainant states that the said complainant by an instrument in writing the precise terms of which are unknown to complainant the same being in possession of defendants or some of them, sold, transferred and conveyed to the defendants Fagley, J. A. Johnson, Leeds and Walker an undivided four-fifths interest in said mine and mineral, the said Pilkey retaining an undivided one-fifth interest therein, which was conveyed to said Walker by said instrument and by him held in secret trust for said Pilkey and in pursuance of said fraudulent combination and conspiracy, the defendants Frank Fagaly, J. A. Johnson, Lee Walker, and H. C. Leeds,
62 together with the defendant J. Q. Wills, caused and procured the defendant Pilkey to stop work upon the said mines under his said agreement and to fail and neglect to record the said location notice, so by him posted thereon as aforesaid, and the said defendants or some of them wrongfully removed the said location notion from said claim and said defendants covered up or concealed the said workings thereon, heretofore done and performed by defendant Pilkey as aforesaid, and by collusion with the said Pilkey, and without the knowledge or consent of your orator and the said Johnson entered into and upon the said lead, lode, ledge and deposit bearing gold and silver, and upon the said parcel or surface ground, including the same mentioned and described in said location notice, and known as the "Sampson mine," and denied and still deny that your orator had or has any interest therein and thereafter, having so procured possession of the same, the said defendants in pursuance of said confederacy, caused to be posted upon said mine a location notice, and filed the same for record in the recorder's office of said county on, to-wit, December 13th, 1893, and caused the same to be there recorded in Book E, page 576, of mining records and a copy whereof is herewith filed, marked "Exhibit C," and made a part of this bill, and thereby the said defendants claim to have located the said lead, lode or ledge bearing gold and silver and other minerals, so first discovered, located and held by the said Pilkey, for the benefit of himself, your orator and the said Benjamin Johnson, and described by him in the said location notice by him thereon posted as aforesaid as the "Sampson mine" for the benefit of themselves as
63 locators under the mining laws of the United States and called and designated the same as the "Washington" lode, and it was agreed in pursuance of said confederacy and for the purpose of concealing from your orator the interest of said Pilkey in said pretended location that each of the four last named defendants should be entitled to a one-fifth interest in said mine, and the said Pilkey should be entitled to the remaining one-fifth, but that said last named interest should be claimed and held by said Walker in trust for said Pilkey.

Your orator further states that the said Benjamin Johnson has conveyed to him all his interest in and to the said Sampson location and mine, and your orator has become and now is the owner of the title and interest of the said Benjamin Johnson.

Further complaining your orator states upon his information and belief that the said mine called and known as the "Sampson" mine is situated within the exterior boundaries of a tract of land claimed to have been granted, on August 2nd, A. D. 1728, by the then governor and captain general of New Mexico, under the Crown of Spain, to one Antonio Lucero, and that the same at date of discovery of the said mines by said Pilkey was and now is claimed by certain persons under the said alleged grant, and claims therefore under said grant were at the date of said discovery, and now are pending in the United States Court of Private Land Claims and are undetermined, but your orator is advised by counsel and believes and so states the fact to be that the said alleged grant to the said Antonio Lucero did not effect the donation of sale of the said lode, ledge, or vein bearing gold and silver, so discovered and held by the said Pilkey and called and known as the "Sampson" mine, and
64 that the said Antonio Lucero has not nor have his heirs, representatives or successors, since become entitled in law or in equity to the gold, silver or minerals contained in the said lead, lode or ledge, called and known as the "Sampson" mine; and your orator avers that by virtue of the said prior discovery, possession, working and location of the said mine by said Pilkey, acting under the agreement before mentioned, your orator became and now is equitably entitled to the said gold, silver and minerals therein contained and in equity and in good conscience has a prior and paramount right and title in and to the same, as against the said defendants or any or either of them.

Your orator further states that the respective defendants, Wills, Childers, Dobson and Dunlap, claim some right or interest in and to the said pretended mining location called and known as the Washington mine derived under or through some of the said other defendants but your orator states that the said Wills and the said Leeds, J. A. Johnson, Julia Johnson, Fagaly and Walker, and each of the defendants *d*erein, at and prior to the time of acquiring any interest in said mine, had full notice and knowledge of the rights of your orator and Benjamin Johnson in and to said mineral deposit and of their said agreement with said Pilkey hereinbefore mentioned. Your orator is advised and so states that the said mineral deposit*s* so discovered by said Pilkey as aforesaid was not and is not subject to location as a mining claim under and in pursuance of the laws of the United States, for the reason that the same is situated as aforesaid within *hte* said alleged private land grant to said Antonio Lucero, but your orator states that by virtue of the said prior
65 discovery, possession and work of the said lode or mine by the said Pilkey under said agreement he became and was and now is equitably entitled to the said gold silver and minerals, contained in said location called the Sampson mine as against the said

defendants or any other person or persons whomsoever, except the Government of the United States and is equitably entitled to the first and preferential right to acquire the legal right thereto from the United States.

Your orator further states that under and by virtue of mesne *and* conveyances your orator has acquired an undivided title and interest as a tenant in common with the other heirs and representatives of said Antonio Lucero, prior and superior to any title or right thereto on the part of the defendants or either of them, and is lawfully entitled to enter upon and work the said mine.

Your orator further states that heretofore the defendant Charles Bonsall in a certain cause pending in this court wherein the defendant James Q. Wills was and is complainant and the defendants Leeds, J. A. Johnson, and Julia Johnson, Wills, Fagaly, Walker and Pilkey, together with one T. B. Mills and J. T. Dougine were and are defendants, was appointed by this honorable court as receiver of the said alleged Washington lode, under the said pretended location thereof by defendants Leeds, J. A. Johnson, Fagaly, Walker and Pilkey, under the name of the "Washington" mine, and that the said Bonsall in pursuance of said order of appointment has entered upon and taken possession of the said Sampson mine and now holds possession of the same as such receiver.

66 Your orator further states that after the removal by said defendants of the said location notice posted as aforesaid by said Pilkey of the said "Sampson mine" a copy thereof was procured by your orator, of which "Exhibit C" filed herewith is a copy and the same was recorded in the office of the recorder of said county, on December 9th, 1893, in volume F of mining records of aid county, folio 7.

Your orator further states that by virtue of the premises he became and was and now is the equitable owner of the said *now is the equitable owner of the said* mineral bearing vein, lead, lode and deposit hereinbefore described, and of gold and silver ores therein contained so discovered, possessed and located by the said Pilkey under the said agreement, and is equitably entitled as against the said defendants to the possession and enjoyment of the same and to the preferential right to acquire the legal title to the same from the United States, and that the said pretended location thereof under the name of the Washington mine by and in the names of defendants Leeds, Johnson, Fagaly and Walker, was and is wholly inoperative and void, and that the defendant Charles Pilkey by reason of his participation in the said fraudulent conspiracy, combination and acts with said defendants under and in pursuance of your orator's said agreement with him, has forfeited all right or interest direct or indirect in and to the said Sampson mine and your orator is equitably the owner of and entitled to the same, and your orator had well hoped that the said defendant would recognize the prior right and title in and to the same and surrender possession to the same and release all claims thereto to your orator, but now so it is that said defendants excepting defendant

Bonsall as receiver, combining and confederating together
67 as aforesaid give out and claim in speeches that the said pretended location and location notice of the said alleged "Washington" lode by the said defendants was and is a valid location as against your orator and that your orator has no title or interest in and to the said mine bearing gold, silver and other minerals, so discovered, possessed and located as the "Sampson mine" by the defendant Pilkey as hereinbefore set forth, and refused to permit your orator to enter upon the said property or to work the same or exercise any acts of possession or ownership thereof, and the defendants respectively claim title to said mining property under and by virtue of said transfer and conveyance from said Pilkey and said pretended location of said Washington lode hereinbefore mentioned.

And your orator shows unto your honor that the hereinbefore described mineral bearing lead, lode, vein or deposit, is only valuable for the ores and minerals contained therein, and that said defendants have been ever since they took possession thereof and are now engaged in mining, extracting and converting to their own use the said ores and minerals, and have mined and removed ores and mineral of great value therefrom and threaten and intend to continue so to do, and will unless enjoined therefrom mine, extract and remove all the said ores and minerals, and thereby the entire substance and value of said property will be destroyed, and your orator will sustain irreparable injury.

And your orator states upon his information and belief that some of the said defendants are wholly insolvent and recovery of damages against them in an action at law will be wholly useless and un-
68 availing. Your orator therefore prays that the said H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, J. Q. Wills, Charles Pilkey, Samuel Dunlap, the heirs and legal representatives of the said Lee Walker, deceased, William B. Childers, Edward Dobson and Charles Bonsall, receiver as aforesaid, be required to full, true and perfect answers make to all and singular the allegations of this your orator's second amended bill of complaint, but without oath, their respective answers under oath being hereby waived, and that the receiver be appointed to take possession of the lead, ledge or deposit, bearing gold, silver and other metals, situated within the mining claim or location, in the Cochiti mining district, Bernalillo county, New Mexico, called and known as the "Sampson" mine and mentioned and described in the location notice thereof made by Charles Pilkey, Ben. Johnson and Henry Lockhart, dated July 10th, 1893, and recorded in vol. 5 of mining records of said county, folio 7, on December 9th, 1893, to keep and hold possession thereof until the further order of this court, and that the said transfer and conveyance executed by said Pilkey to said Fagaly, Leeds, J. A. Johnson and Walker be decreed fraudulent and void as against your orator, and the *said* be cancelled and annulled, and that the location and location notice of the said "Washington" lode by and in the name— Frank Fagaly, Lee Walker, H. C. Leeds and J. A. Johnson be decreed to be void and of no effect as against your orator, and that the

said defendants be enjoined from mining, working or removing from the said "Washington" lode any ore or mineral and your orator be decreed to be the equitable owner of the said ore and mineral
69 contained therein and entitled to the prior and preferential right to acquire the legal title thereto from the United States, by virtue of the said prior discovery and appropriation thereof by said Pilkey and for such other and further relief as may be equitable and proper in the premises.

And your orator prays as by his original bill of complaint, he has already prayed.

(Signed) WARREN, FERGUSSON & GILLETT,
Sol's for Complainant.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Henry Lockhart, being duly sworn says that he is the complainant in the above and foregoing amended bill of complaint, by him subscribed, and has heard read and knows the contents thereof and the matters and things therein contained are true of his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes them to be true.

(Signed) HENRY LOCKHART.

Subscribed and sworn to before me this 6th day of January, A. D. 1896.

(Signed) S. B. GILLETT,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsement: 3888. Henry Lockhart *vs.* J. Q. Wills *et al.* Second amended bill. In the second judicial district court, Bernalillo county, New Mexico. Filed in my office this 6th day of January, 1896. O. N. Marron, clerk.)

"EXHIBIT A."

Articles of Agreement.

For and in consideration of the sum of one dollar to him in
70 hand paid, the receipt of which is hereby acknowledged, Charles Pilkey, party of the first part, agrees with Henry Lockhart and Benjamin Johnson, parties of the second part, all of whom are residents of Bernalillo county, New Mexico, to enter into a partnership for the purpose of discovering, locating and operating mining claims.

The considerations of this agreement are that the said first party shall prospect and locate such veins and lodes and placers as he may discover or know the existence of containing valuable ores or minerals in the name of and for the joint benefit of all the parties hereto; in the proportion of one-third interest to said first party and an undivided two-thirds interest to the second parties.

The said second parties are to furnish the said first party at their expense with the following articles and tools, viz:

Twenty-five pounds of giant powder, 100 feet of fuse, one box of caps, one hammer, — lbs. of drill steel, and one pick, and when he shall — sunk or driven a shaft or tunnel four feet by six feet in a vein of mineral bearing quartz to a depth of twenty feet from the lowest level of the surface at its mouth, such vein and locality to be designated by said second parties, he shall receive in addition the sum of thirty dollars, less any moneys or provisions or other articles except as above enumerated.

Said work to be begun within twenty days from the date of this agreement and prosecuted with due diligence to the completion and to the satisfaction of the said second parties. The said first party to furnish the second parties from time to time at their request samples of all ores and minerals discovered or taken out of any workings.

71 It shall be at the option of the said second parties to continue working or abandon any claim located at any time they deem proper. This agreement to continue in force and effect for one year from its date, all discoveries or locations made during that time by said party to be covered by this agreement. The said first party has no power to create any debt or make any contract binding the second parties to this agreement unless authorized to do so in writing by the said second parties. Any concealment of a discovery or failure to locate of a valuable mineral claim or claims for the purpose of evading the terms of this agreement and defrauding the said second parties shall work a forfeiture of any right or interest, direct or indirect, that such first party might have or afterwards obtain to and for the benefit of the said second parties.

Dated May 7th, 1893.

(Signed) CHARLES PILKEY. [SEAL.]
" HENRY LOCKHART. [SEAL.]
" BENJ. JOHNSON. [SEAL.]

Witness:
W. C. HEACOCK.

(Endorsed on back: "Article of agreement—Charles Pilkey and Lockhart and Johnson." Also seal and certificate of recordation, signed by J. W. Harris, recorder, that same was filed for record on the 7th day of December, 1893, at 11 o'clock a. m. in vol. E of mining records of Bernalillo county, page 562.)

"EXHIBIT B."

The undersigned, —— ——, citizens of the United States, over the age of 21 years, having complied with all the requirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs, and regulations in

72 force relative to such locations, have located and do hereby claim by right of discovery and location fifteen hundred

(1500) linear feet on and along this lode, vein, deposit of mineral bearing rock in place, together with three hundred (300) feet of surface ground along and on each side of said 1500 feet. The claim hereby located is situate in the Cochiti dis. mining district, county of Bernalillo, Territory of New Mexico, and is more particularly described as follows:

Beginning at the monument of stones (monument No. 1) erected on said lode, lead and deposit, said monument No. 1 being the north end monument of this claim, and being the center of the north end line of said claim; thence west 300 feet to a monument of stones (No. 2); thence south 1500 feet to a monument of stones (No. 3); thence east 300 feet to a monument of stones (No. 4), said monument No. 4 being the south end monument and the center of the south end line of this claim; thence east 300 feet to a monument of stones (No. 5); thence north 1500 feet to a monument of stones (No. 6); thence west 300 feet to the place of beginning.

And for further description the lode is of grayish quartz from three to five feet wide, and can be traced for (1000) yards, dips into the mountain.

This claim was located July 10th, A. D. 1893, and shall be known as the "Sampson mine." A copy of this notice is placed on monument No. — in the center of claim by a pine tree with bark off on south side.

CHARLES PILKEY,
BEN. JOHNSON,
HENRY LOCKHART,
Locators.

73 Notice posted on claim in presence of
IDA PILKEY,
LEE DUDLEY,
Witnesses.

(Endorsed: Name of claim, "Sampson mine." Names of locators, Charles Pilkey, Ben. Johnson, Henry Lockhart. Territory of New Mexico, county of Bernalillo, *ss.* I hereby certify that this instrument was filed for record on the 9th day of December, A. D. 1893, at 11 o'clock a. m., and recorded December 19th, A. D. 1893. J. W. Harris, recorder.)

"EXHIBIT C."

Notice of Location.

The undersigned, citizens of the United States, over the age of twenty-one years, having complied with all the requirements of the United States and territorial laws now in force relative to mineral locations, and with all local customs and regulations in force relative to such locations, have located, and do hereby claim by right of discovery and location 1500 linear feet on and along this lode, vein, deposit of mineral bearing rock in place, together with 300 feet of surface ground along and on each side of said 1500 feet.

The claim hereby located is situated in the Cochiti mining district, county of Bernalillo, New Mexico, and more particularly described as follows:

Beginning at a post No. 1 erected on said lode, lead and deposit, said post being the north end center monument of this claim, and being the center of the north line of said claim marked ("north end center post"); thence east 300 feet to the northeast corner
74 post No. 2, marked "northeast corner post;" thence south 1500 feet to post No. 3, southeast corner post, marked "southeast corner post;" thence east 300 feet to post No. 4, marked "south end center post;" thence 300 feet to post No. 5, marked "southwest corner post;" thence north 1500 feet to post No. 6, marked "northwest corner post;" thence east 300 feet to the place of beginning. All of said marks being in pencil, and the discovery shaft of said claim being located within the exterior lines thereof and on the lode or lead located and upon which said discovery shaft is posted a copy of this notice of location, and in the monument of stones around all of said post- referred to are piles of stones.

Said claim being about two miles north of Peralta mountain, Cochiti mining district, Bernalillo county, New Mexico.

This claim is located in the said mining district, about 60 feet from the north end center where location line paper is nailed to pine tree about 60 feet south of north end center line. Direction from a big pine tree marked with a blaze.

This location is an amended location of said claim, the original thereof having been made on the 20th day of October, A. D. 1893. Said claim shall be known as the "Sunny South lode." Located by F. Fagaly, J. A. Johnson, H. C. Leeds, Lee Walker, locators.

Filed for record December 30th, 1893, at 10 a. m., and recorded January 15th, 1894.

"EXHIBIT C."

The undersigned, —— —— citizens of the United States and over the age of twenty-one years, having complied with all requirements of the United States and territorial laws now in force relative
75 to mineral locations, and with all local customs and regulations in force relative to such locations, ha- located, and do hereby claim the right of discovery and location, fifteen hundred (1500) linear feet on and along this lode, vein, deposit of mineral bearing rock in place, together with three rundred feet of surface ground along and on each side of said 1500 feet. The claim hereby located is situate in the Cochiti mining district, county of Bernalillo, Territory of New Mexico, and is more particularly described as follows:

Beginning at a monument of stones (monument No. 1), erected on said lode, lead and deposit, said monument No. 1 being the north end monument of this claim and being the center of the north end line of said claim; thence west 300 feet to a monument of stones (No. 2); thence south 1500 feet to a monument of stones (No. 3);

thence east 300 feet to a monument of stones (No. 4), said monument No. 4 being the south end monument and the center of the south end line of this claim; thence 300 feet to a monument of stones (No. 5); thence north 1500 feet to a monument of stones (No. 6); thence west 300 feet to the place of beginning.

And for further description the lode is of grayish quartz, from three to five feet wide, and can be traced for 1000 yards. Dips into the mountain.

This claim was located July 10th, A. D. 1893, and shall be known as the Sampson mine. A copy of this notice is placed on monument No. — in the center of the claim by a pine tree with bark off on the south side.

CHAS. PILKEY,
BEN JOHNSON,
HENRY LOCKHART,
Locators.

76 Notice posted on the claim in presence of
ADA PILKEY,
LEE DUDLEY,
Witnesses.

(Endorsed on back: Notice of mining location. Name of claim, "Sampson." Name of locators, Charles Pilkey, Ben Johnson, Henry Lockhart. Filed for record this — day of —— A. D. 189–. ——, recorder. Territory of New Mexico, county of Bernalillo. This instrument was filed for record on the 9th day of December, 1893, at 11 o'clock a. m. Recorded in volume F of mining records of said county, folio 7. J. W. Harris, recorder.)

And thereafter, on, to-wit, the 20th day of January, 1896, there was filed in the office of the clerk of the said court in the said cause, a motion to strike amended bill from file, which said motion is in words and figures following, towit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

HENRY LOCKHART }
vs. } No. 3888.
JAMES Q. WILLS ET AL. }

Now come the defendants in the above entitled cause, by their solicitors, and move the court to strike from the files thereof the amended bill of complaint filed by the plaintiff herein, for the following reasons:

Because at the time the court sustained the demurrer to the original bill filed in this cause, the plaintiff was given —— days within which to file an amended bill and said complainants failed to file

the same within said time and never acquired any leave of the court for filing the same at any other time, and that the same is
77 therefore irregularly upon the files in said cause.

(Signed) CHILDERS & DOBSON,
Solicitors for Defendants.

(Endorsed: No. 3888. In the district court, county of Bernalillo. Henry Lockhart *vs.* J. Q. Wills, *et al.* Filed in my office this 20th day of Jan. 1896. O. N. Marron, clerk.)

And thereafter, at the regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, on the 10th day of April, 1896, the same being the thirty-fifth day of the said term, the following, among other proceedings, were had and entered of record:

Present: The Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof.

HENRY LOCKHART
vs.
JAMES Q. WILLS ET AL. } No. 3888. Chancery.

At this day this cause is heard upon the demurrer of the respondents to the amended bill of complaint herein, and the court being fully advised of and concerning the same;

It is ordered, adjudged and decreed that the said demurrer be and it is hereby sustained, with leave to the said complainant to amend as he may be advised.

And thereupon comes the complainant and filed herein his second amended bill of complaint, and on motion of complainant
78 It is ordered that the said respondents be and they are hereby ruled to plead to said second amended bill of complaint within ten days.

And thereafter, to-wit, on the 10th day of April, 1896, there was re-filed in the office of the clerk of the said court in the said cause, the second amended bill of complaint and exhibits thereto attached, which said second amended bill of complaint is in the same words and figures as the first — second amended bill of complaint heretofore filed.

And thereafter, on the 14th day of April, 1896, there was filed in the office of the said clerk of said court, the demurrer of defendants to the second amended bill of complaint, which said demurrer is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court, Second Judicial District.

HENRY LOCKHART, Complainant,
vs.
H. C. LEEDS, J. A. JOHNSON, JULIA A. JOHNSON, CHARLES PILKEY, Samuel Dunlap, Lee Walker, William B. Childers, Edward W. Dobson and Chas. Bonsall, and J. Q. Wills, Defendants.

And now come the above named defendants, H. C. Leeds, J. A. Johnson, Julia Johnson, J. Q. Wills and Chas. Bonsall, by their solicitors, W. B. Childers and E. W. Dobson; and the defendants, Chas. Pilkey and Lee Walker, by their solicitor, W. C. Heacock, and defendants W. B. Childers and E. W. Dobson in their own proper persons, by protestation, not confessing or acknowledging any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, and demur to said amended bill, and for
79 cause of demurrer allege the following:

1. Because the bill does not allege that the defendants, Dunlap, Johnson, Leeds and Walker, entered in and upon said mining claim at any time prior to the tenth day of October, 1893; that is to say, within three months after said mine is alleged to have been located under the name of Sampson.

2. Because it appears from the allegations in complainant's amended bill that no valid location notice was ever posted upon the surface of said claim or recorded in the recorder's office of the proper county, as required by law.

3. Because it does not appear from said amended bill that complainant and his co-locators ever did the work required by law to be done within three months after taking possession of said claim, or otherwise complied with the requirements of the law, as to perfecting mining locations.

4. Because the agreement alleged to have been made between complainant and said Johnson with one Pilkey was subject to revocation by either party thereto at any time, and the facts alleged in the amended bill amounted to an abandonment of said alleged Sampson claim under the terms of said alleged agreement.

5. Because it does not appear from said amended bill when the complainant acquired an undivided interest in said alleged grant with the heirs of Antonio Lucero, deceased, or what the nature, extent and amount of said interest is, or through what mean conveyance it was acquired.

6. Because it does not appear that at the time the alleged entry by defendants Dunlap, Walker, Leeds and Johnson was made
80 on said mining claim, that the complainant or his co-locators under the alleged Sampson location were in possession of the

said mining claim, or any part thereof or had any lawful right to the possession thereof.

7. Because it does not appear from the allegations in said amended bill that the defendants are not co-tenants with the heirs of Antonio Lucero, deceased, and have a larger interest and a better right to the possession of the surface ground of said claim than the complainant.

8. Because ownership in said alleged grant confers no interest in the mineral thereon, or the right to mine the same.

9. Because the complainant's remedy is at law and the amended bill does not state a case for a court of equity.

Wherefore these defendants demur to said amended bill and to all the matters and things contained therein and pray the judgment of this honorable court, whether they shall be compelled to make any further or other answer thereto; and pray to be dismissed with their reasonable costs in this behalf sustained.

CHILDERS & DOBSON,
Solicitors for Defendants.

W. B. Childers, of lawful age, counsel for defendants, certifies that the foregoing demurrer is, in his opinion, well founded in point of law.

(Signed) W. B. CHILDERS.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

W. B. Childers, being duly sworn, upon oath deposes and says that he is a counsel for the defendants for whom the foregoing demurrer is filed, and that said demurrer is not interposed for delay.

(Signed) W. B. CHILDERS.

81 Subscribed and sworn to before me this — day of —, A. D. 1895.

—— ——.

And thereafter, to-wit, on the 28th day of April, 1896, there was filed in the office of the said clerk of said court, the petition on intervention of Joel Parker Whitney, which said petition is in words and figures following, to-wit:

In the District Court, County of Bernalillo.

HENRY LOCKHART, Complainant,
vs.
H. C. LEEDS, J. A. JOHNSON, JULIA A. JOHNSON, His Wife; J. Q. Wills, Charles Pilkey, Samuel Dunlap, Successor in Interest of Frank Fagaly, Deceased; the Heirs and Legal Representatives of Lee Walker, Deceased; William B. Childers, Edward W. Dobson, and Chas. Bonsall, Receiver, Defendants. } In Equity.

The Petition of Intervention of Joel Parker Whitney in the Above Entitled Suit Now Pending in the said Court.

Your petitioner, Joel Parker Whitney, a resident of Rockland, in the county of Placer and State of California, presenting this petition to the Hon. Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the said district court, thereupon shows and alleges as follows:

1. At the time when as alleged in the bill of complaint in the said suit, the defendant Charles Pilkey, first entered upon the tract of mineral land described in the said bill under the designation of the "Sampson mine," and for upwards of ten years continuously immediately before that time, your petitioner was seized and possessed of all and singular a certain tract of land known as the Canada de Cochiti grant, situate in the county of Bernalillo and Territory of New Mexico,
82 and bounded on the north by a prehistoric stone ruin, in the vicinity of the Potrero de las Vacas, on the east by the river commonly called the Rio Grande, on the south by the Indian pueblo of Cochiti, and on the west by a range of mountains known as the Sierra de Jemez, which said tract of land last described was thereupon and upwards of ten years ago, your petitioner then and there being in actual possession thereof, claiming the same as his property, surveyed by authority of the Government of the United States at your petitioner's special request and at his sole expense, and was thereupon, as surveyed, platted and laid down upon the public governmental maps under the designation of the Canada de Cochiti grant.

2. All and singular the said tract of land known as the Canada de Cochiti grant was granted by the King of Spain, through his governor of New Mexico, to one, Antonio Lucero, in the year 1728, and the said grantee was thereupon duly put into juridicial possession of all and singular the said granted premises, in the same year, and thereafter continuously from the said year 1728, with occasional brief interruptions caused by Indian hostilities and depredations and continuing only during the time thereof, the said tract of land has been possessed and claimed, first by the said grantee, and since his death, which occurred prior to the year 1760, by his descendants

(his lawful heirs) and their assigns, and by your petitioner as purchaser of the said granted tract from the said heirs and assigns, up to the time of the grievances hereinafter set forth; such claim and possession being under the assertion of the said grant title.

83 3. Your petitioner in acquiring his title aforesaid to the said granted premises, intended to acquire, and believed until lately that he had acquired the title to the whole thereof, except a few small strips of agriculture lands, parcel of the said premises, which are held and occupied in severalty by divers persons deriving title under the said grant, each and all of which said strips are situate wholly outside of the particular land and premises affected by the said suit; but your petitioner alleges, on his information and belief, that certain persons unknown to your petitioner now claim to be entitled to divers small undivided shares in the said granted premises as tenants in common of the said premises with your petitioner, but he is unable more particularly to state what persons so claim and what undivided shares of the said premises are claimed by them or any of them, except that he is informed and believes that Bernard S Rodey and Mariano S. Otero, both of the city of Albuquerque, county of Bernalillo, Hannah Harris, whose residence is unknown to your petitioner, Thomas Lowthian and Charles H. Toll. of the city of Denver and State of Colorado, Levi Hughes and John W. Akers, of the city of Santa Fé and Territory of New Mexico, and all parties to the said suit; claim to have purchased small undivided shares in the said granted tract of land.

4. However, your petitioner alleges that he is seized and possessed of an undivided moiety and upwards of the said granted tract of land and has been so seized and possessed for upwards of ten years last past, and, upon his information and belief, he further alleges that he is and for the said period of time has been seized and possessed of upwards of nine undivided tenth parts of the same.

84 5. About two years before the said defendants, Charles Pilkely, or any or more of the others of the said defendants, or the said complainants ever entered upon or possessed or operated or in any manner claimed the land and premises which are the subject of the said suit, or ever did concerning the same any matter or thing alleged in the said bill or in any of the pleadings in the said suit, and while the said parcel of mining land which is the subject of the said suit was in fact vacant, although in the constructive possession of your petitioner, your petitioner, together with the said Bernard S. Rodey and Hannah Harris and the said holders of the said strips in severalty —, duly presented to the Court of Private Land Claims of the United States, the said grant or private land *claims of the United States, the said grant or private land* claim and prayed its consideration and confirmation thereof, in an appropriate suit to that end, wherein your petitioner and his said co-petitioners therein were plaintiffs and The United States of America was defendant, and in the suit last mentioned such proceedings were thereupon had, after due proofs and hearing, that the said Court of Private Land Claims on the — day of ——, 1894, passed its final de-

cree therein confirming the said grant, but, in and by said decree fixing its boundaries on the north by an east and west line drawn east from certain ruins on the mesa of Cochiti, on the east by the said Rio Grande, on the south by the Indian pueblo of Cochiti, and on the west by a line drawn south from the said last mentioned ruins to an east and west line protracted, conformably to the north boundary of the said Indian pueblo of Cochiti, to the Rio Grande.

85 6. Feeling aggrieved by the said decree, in so far as the same by its terms restricted the boundary of the said grant to limits different from those claimed as aforesaid by your petitioner and his said co-petitioners, they, with a view to a modification of the said decree by making the same conformable to the terms of the said grant in respect of the boundaries thereof, that is to say with a view to obtaining a decree confirming the said grant with the boundaries thereof as hereinbefore set forth, duly appealed from the said decree of the Court of Private Land Claims to the Supreme Court of the United States; their said appeal bearing date the — day of ——, 1895, and being and now remaining duly docketed in the said Supreme Court as of the October term thereof, A. D. 1894.

7. The said appeal is now pending in the Supreme Court of the United States, unheard and undetermined, and operates as a supersedeas of the said decree so appealed from, and the said grant remains *sub judice* and the same has been *sub judice* in the political department of the Government from a long time prior to that date of the said official survey, and no part of the said tract of land within the boundaries thereof hereinbefore first described, and within the said grant or private land claim, to the extent that the said grant or private land claim is asserted by your petitioner and the said other claimants thereof by their said possession and claim, by the said official survey, by their said suit in the Court of Private Land Claims and by their said pending appeal, is, or ever has been part of the public domain of the United States, nor is nor ever has been subject to the general mining laws or other general land laws of the United States or to any claims or pretenses founded thereon.

86 8. All and singular the parcel of mining land described in the said bill of complaint and other pleadings in the said suit now pending in this court, including what is therein referred to as the "Sampson mine" and also what is therein referred to as the "Washington mine," is situate wholly within the said Canada de Cochiti grant as the same was granted and delivered in possession to the said Antonio Lucero aforesaid, and is now claimed by your petitioner and the said others in and by their said suit in the Court of Private Land Claims and their said appeal now pending in the Supreme Court of the United States.

9. Neither the said complainant nor the said defendants, nor any thereof, have or has any estate, right, title, interest, possession, claim or demand of, in or to, the said parcel of mining land described in the said bill and pleadings or either thereof by or under the mining or other land laws of the United States having reference to the public

domain nor under nor by reason of any pretended mining location or locations described in the said bill and pleadings.

10. Although your petitioner is informed by hearsay, that the said complainant and defendant or some of them have acquired by purchase certain very small and insignificant undivided shares in the said Canada de Cochiti grant, and by virtue of such purchase thereof claim to be entitled as tenants in common to the possession and enjoyment of said grant, yet your petitioner has no knowledge or information sufficient to form a belief whether or not in fact either the complainants or the said defendants or any thereof have ever made any purchase or claim under the said grant title, and he there-
87 fore prays that the complainant and the defendants and each of them may be compelled by this court to discover and disclose such interest and possession in or under the said grant title, as they or any of them respectively may have or pretend to have in common with your petitioner.

11. Except so far as he is informed by the said bill and pleadings your petitioner has no knowledge or information as to the alleged dealings by and between the complainant and the defendant Charles Pilkey or as to any agreement or combination alleged to be existing amongst the defendants to the prejudice of the complainant, but your petitioner alleged that both the complainant and the defendant as they several times set up in the said bill and pleadings entered upon said parcel of mining lands, which is the subject of this suit, and caused the same to be mined and worked and extracted large quantities of valuable gold and silver ore therefrom, to-wit, ore of the value of upwards of $20,000, and caused the said ore or a great part thereof after such extraction to be sold and disposed of in the city of Pueblo, Colorado, and elsewhere, and converted to their own use or to the use of some of them large sums of money derived from said sales and disposition, and the said defendants, as alleged in said bill and pleadings, are now in the actual occupation of the said parcel of mining land, both personally and by the instrumentality of the defendant Charles Bonsall, as receiver, under color of his receivership, created by this court, and, so being in such actual occupation of the said parcel of mining land, the said defendants are wasting and despoiling the same and without conducting mining thereof in a scientific, prudent and business like manner, are
88 devoting all their energies to the immediate extraction and conversion of the valuable ores most easily and immediately obtainable therein, with the intent of shipping and transporting the said ores to the said city of Pueblo and elsewhere, outside of the jurisdiction of this court, and there selling and disposing of the same and enjoying and appropriating the pecuniary proceeds thereof for their own exclusive use and to the exclusion of your petitioner from all participation or benefit in the premises.

12. While your petitioner admits that the complainant and defendants so far as they may be vested with any undivided shares in the said granted tract of land in common with your orator are entitled as such tenants in common to enjoy with your petitioner

the unity of possession of the said common property, he denies that, without his consent, they have, either as tenants in common or as trespassers, any lawful or equitable right either to exclude him from the possession or enjoyment of the said parcel of mining ground or from the said mine thereon or from participation in the working of the said mine, and in the profits thereof, or to appropriate or enjoy any part of the proceeds of the said mine, except such *pro rata* distributive shares thereof as may be conformable with their respective interest as tenants in common with your petitioner of said grant, and your petitioner further alleges that he has not consented to the occupation or working of the said parcel of mining land, or to the appropriation or conversion of any of the ores extracted therefrom, or the proceeds of any such ores by the complainant and the defendants or by any thereof; but he hereby offers to such of the defendants as may be tenants in common with him of the said
89 grant his co-operation and participation in the working and developing of the said mine and his due and equitable contribution to the reasonable expenses attending the same; insisting, however, that out of the net proceeds of such mining operations, such of the said defendants as are tenants in common of the said grant should receive only their just and equitable proportion, according to their respective shares as such tenants and no more, and your petitioner should receive in like manner his own just and equitable proportion.

13. Notwithstanding the hearsay information imparted to your petitioner as aforesaid as to the claim and pretense of the complainant and defendants or some of them that they are tenants in common with your petitioner of said grant, your petitioner alleges, upon his information and belief, that neither the complainant nor defendants nor any one or more of them have or has any estate right, title, or interest, possession, claim or demand in law or in equity, of, in or to the said grant or the said parcel of mining land or any share or interest therein, but that they are all and singular mere trespassers and intruders upon the said grant and parcel of mining land, without title or right or color of title or right, and that they neither have nor pretend to have, either jointly or severally, any pretense or shadow of title except the several mining locations described in the bill of complaint and pleadings, and further, that under the said pretended mining location of the "Washington mine," the defendants, in utter disregard of the fact that the said parcel of mining land is *sub judice* upon the said appeal, are now wrongfully engaged in the said mining, and in the conversion of the said extracted ores and the proceeds thereof, and they
90 as well as the complainant, give out and threaten that they will henceforth continue to mine upon the said parcel of mining land and extract and convert the ores thereof.

14. The said parcel of mining land is of very little value, except for the purpose of mining, and for that purpose it is of exceedingly great value, and the defendants by their tortious acts aforesaid are wasting and destroying the essential substance of the said land and

they threaten to continue the said tortious acts, and they are not responsible pecuniarily for the wrong and injury to your petitioner, which they are so committing and intending to commit.

15. Your petitioner, protesting that, by virtue of his title aforesaid, he has the immediate right to have and enjoy, mine and operate the said parcel of mining land and the said mines thereon as tenant in common, of the said grant, and to receive appropriate and enjoy his due and equitable share of the issue and profits thereof, further alleges that, independently of the question of his mere legal right or possession of the said land, he has, in view of the premises hereinbefore stated and especially in view of the said pending appeal, and the grounds upon which it is founded, a reasonable and equitable expectancy that the said decree of the Court of Private Land Claims, will by the decree of the Supreme Court of the United States upon the said appeal be so far modified that the said grant or private land claim will be finally confirmed with boundaries as hereinbefore first stated, so as to cover an area of land inclusive of the said parcel of mining land, and further that, upon the final confirmation of the said grant, upon the said appeal, your petitioner and the other tenants in common thereof will be lawfully entitled to mine upon the said parcel of mining
91 land and to extract and appropriate all the gold, silver and other metals therein, for their own use, to the exclusion of the complainant and the defendants and all other strangers to the said grant title; and he submits to your honor, that, pending the said appeal and while the said grant remains *sub judice* thereunder, it is inequitable that the complainant and the defendants or any other stranger to the said grant title should be permitted lawlessly to open and work mines upon the said parcel and mining land or to extract or convert ores therefrom, and thus waste and destroy, to the prejudice, wrong and injury of your petitioner, the very substance of the subject matter involved in the said appeal.

16. Your petitioner has repeatedly notified the complainant and the defendants and their agents of his interest, right and claim in the premises and requested to be admitted to the due enjoyment thereof, and he has notified the Pueblo Smelting and Refining Company, a corporation created under the laws of the State of Colorado, and doing business in the said city of Pueblo, and which, your petitioner had been informed, was dealing with the defendants on the subject of the purchase from them of ores extracted from the said parcel of mining land, not to turn over to the said defendants any proceeds of such ores and not to deal in such ores without your petitioner's consent, but both the complainant and the defendants have denied and refused to your petitioner any possession of the said parcel of mining land and to any participation in the mining thereof or in the profits of such mining, and the defendants, notwithstanding the protest and notice of your petitioner in that behalf, have since insisted on dealing or attempting to deal respecting the said
92 ores with the said Pueblo Smelting and Refining Company, and ever since the entry upon the said mining land by the

defendant Charles Pilkey *have* set forth in the said bill, and ever since the defendants entered upon the same premises pretending to make thereon a location of the "Sampson mine" and a location of the "Washington mine" respectively, your petitioner has been and he still is wrongfully excluded by the complainant and defendants from the said parcel of mining land and from mining thereon and from any participation whatever in the product, issues or profits thereof.

16. Your petitioner is with- adequate remedy at law in the premises.

17. Your petitioner alleges upon his information and belief, that the said parcel of mining land has, by order of this court, in a certain suit in equity therein depending, but *to* the particulars whereof your petitioner is not informed, been placed in the possession of the defendant Charles Bonsall, as receiver of this court, and the same is now nominally in his official custody, as such, but the said receiver is co-operating with the said other defendants in the operation of the said mine upon the said land; and your petitioner is advised by counsel and submits to the court that because the said parcel of mining land is in the custody of the law, he cannot in the present circumstances maintain respecting the same an action of ejectment against any of the parties to this suit.

18. By reason of the premises, your petitioner and the other cotenants of the said grant and co-claimants under the said private land claim are lawfully and equitably entitled to the immediate possession of the said parcel of mining land and to an im-

93 mediate and preferential status as claimants thereto, and in case the said parcel of mining land, as a result of the said decree in the Court of Private Land Claims or of the said appeal therefrom, should become a part of the public domain, they will thereupon become also, lawfully and equitably, entitled to the exclusive expectant right to uphold, continue and perfect the said possession and claim and, upon the foundation of such possession and claim, to locate as a mining claim the said parcel of mining land and the mineral lode therein, under the mining laws of the United States.

Wherefore your petitioner prays, that as an intervenor, he may by order of this court be made a party to this suit and that by due process to that end, the complainant and defendants therein may be required to answer all and singular the allegations of this petition; that the complainant and each and all of the defendants may be required to disclose and discover what if any shares or interest they have or claim respectively of, in or to the said grant in common with your petitioner, and may be compelled to account to and with your petitioner for and respecting all ores extracted from the said parcel of mining land and all proceeds of such ores; that, upon such an accounting, it may be ascertained and decreed what part of the net proceeds of such ores justly and equitably belongs to your petitioner and that the payment thereof to him may be ordered and compelled; that pending this suit some suitable person, disinterested

and impartial, may be appointed receiver of the said parcel of mining land and of all the proceeds thereof and may be authorized to operate the said mine under the direction of the court, and may be required to deposit in the court to the credit
94 of this suit the net proceeds of such mining; that the distributive share of your petitioner as well as the distributive shares of the other parties who shall appear to be entitled in the premises, in the said proceeds, may be ascertained and paid accordingly; that by order of this court, your petitioner, his agents and attorneys, may be permitted at all reasonable times to visit and inspect the said parcel of mining land and the said mine and the operations thereof and all the books and papers in the hands of such receiver or of his agents concerning the same; that the said receivership may be continued until the determination of the said appeal or the further order of this court in the premises.

That it may be declared and decreed that your petitioner and the other tenants in common of the said grant are equitably entitled to the exclusive possession of the said parcel of mining land and to the right of mining thereon the gold and silver and other metals both immediately and in the case that upon the said appeal the said decree of the Court of Private Land Claims shall be so modified by the decree of the Supreme Court of the United States and to confirm to the said grantee, his heirs and assigns, an area of land including the said parcel of mining land; that it may be also declared and decreed, that in case the said decree of the Court of Private Land Claims should be affirmed on the said appeal or the said appeal should be dismissed, your petitioner and his co-tenants of the said grant are entitled to the preferential right to occupy and hold the said parcel of mining land under the general mining laws of the United States, by conforming to the provisions of the said laws as well as of the laws of the said Territory in that behalf, that, at the termina-
95 tion of the said receivership so to be created in this suit, the receiver may be ordered and directed to deliver possession of the said parcel of mining land to your orator and the other tenants in common of the said grant, that pending this suit, the complainant and the defendants, except the said receiver Bonsall, may by writ of injunction issuing out of this court and under its seal addressed to the said Henry Lockhart, H. C. Leeds, J. A. Johnson, Julia A. Johnson, his wife, J. Q. Wills, Charles Pilkey, Samuel Dunlap, successor in interest to Frank Fagaly, deceased, their heirs and legal representatives of Lee Walker, deceased, William B. Childers, Edward W. Dobson and Charles Bonsall, receiver, be restrained from entering upon the said parcel of mining land, and from mining thereon and from extracting ores therefrom, and from shipping, transporting, or intermeddling with any metallic or other products of the said premises and from selling or attempting to sell any such ores or product, and from demanding or receiving any pecuniary or other proceeds of ores from the said premises, and from demanding or receiving any rents, issues or profits of the said premises, and from in any manner interfering with the said parcel of mining land

or any mining operation thereon or any business pertaining thereto; and that your petitioner may have such other and further relief in the premises as may be just and equitable, together with his costs.

This petition is exhibited by your petitioner in his own behalf as well as in the behalf of all others in like circumstances who shall come in and contribute to the expenses of this intervention.

All of which is respectfully submitted, &c.

(Signed) JOEL PARKER WHITNEY, *Petitioner.*

96 (Signed) JOHN H. KNAEBEL,
Solicitor for Petitioner.

Santa Fe, New Mexico.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

John H. Knaebel, being duly sworn, deposes and says that he is the solicitor for Joel Parker Whitney, the above named petitioner, that the said petitioner is now absent from the Territory of New Mexico on the Atlantic sea board; that this verification is made by this deponent because of such absence and because the exigencies of this intervention require speedy action and do not admit of further delay; that the foregoing petition is true of this deponent's own knowledge except as to those matters herein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

(Signed) JOHN H. KNAEBEL.

Subscribed and sworn to before me this 6th day of April, A. D. 1896.

(Signed) NELLIE PRESTON,
Notary Public.
[NOTARIAL SEAL.]

My commission expires December 26, '97.

(Endorsed: No. 3888. In the district court. Henry Lockhart *vs.* H. C. Leeds *et al.* Petition of intervention of Joel Parker Whitney. Filed in my office this April 18th, 1896. O. N. Marron, clerk.)

And thereafter, to-wit, on the 28th day of April, 1896, there was filed in the office of the said clerk of said court, a suggestion on foot of petition of intervention, which said suggestion is in words and figures following, to-wit:

District Court, County of Bernalillo.

HENRY LOCKHART }
vs.
H. C. LEEDS ET AL. }

97 *In re* intervention of Joel Parker Whitney.

Now comes the said intervenor, and on the foot of his petition of intervention filed in this cause, on the 18th day of April, A. D. 1896,

informs the court that he has just been informed that the receivership heretofore vested in the defendant Charles Bonsall, as stated in the said petition, has been terminated by the discharge of the said Bonsall from the said office; and he prays that, under his said petition, Edward W. Dobson or some other suitable person may be appointed receiver of the property here in controversy.

(Signed) JOEL PARKER WHITNEY,
(Signed) By JOHN H. KNAEBEL,
His Solicitor.

Dated Albuquerque, April 28, 1896.

(Endorsed: No. 3888. District court, county of Bernalillo. Henry Lockhart *vs.* (chancery) H. C. Leeds *et al.* Suggestion on the foot of petition of intervention. Filed in my office on this the 28th day of April. O. N. Marron, clerk.)

And thereafter, on, to-wit, October 11th, 1897, there was filed in the office of the clerk of the said *office*, in the said cause, a motion of plaintiff to consolidate causes 3888, 4273 and 4275, which said motion is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the Second Judicial District Court.

HENRY LOCKHART, Complainant, }
vs. } No. 3888.
H. C. LEEDS ET AL., Defendants. }

HENRY LOCKHART, Plaintiff, }
vs. } No. 4273.
J. Q. WILLS ET AL., Defendants. }

98 HENRY LOCKHART, Complainant, }
vs. } No. 4275.
J. Q. WILLS ET AL., Defendants. }

Henry Lockhart, the said plaintiff and complainant, moves the court for an order that the said before named actions be consolidated and tried together, and that the plaintiff in said respective causes have leave to file an amended and supplementary complaint to said consolidated actions.

And for grounds of this motion shows unto the court that said actions all related to the same question, and are of a like nature and are brought by him, the said plaintiff therein, for the purpose of recovering from the said defendants therein the title and possession of the same mine, mining claim and property, with damages, and to enjoin and restrain the said defendants from mining and removing ores and mineral from the same.

(Signed) WARREN, FERGUSSON & GILLETT,
Attorneys for Henry Lockhart.

Copy of the above motion received this 9th day of October, 1897.

(Signed) CHILDERS & DOBSON,
Attorneys for Defendants.

(Endorsed: No. 3888. Filed in my office this October 11th, 1897. O. N. Marron, clerk.)

And thereafter, to-wit, at the regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court house of the said county, on the 11th day of October, 1897, and being the seventh day of the said term, the following proceedings,
99 among others, were had and entered of record, to-wit:

Present: The Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof.

HENRY LOCKHART *vs.* H. C. LEEDS ET AL. } No. 3888.

HENRY LOCKHART *vs.* H. C. LEEDS ET AL. } No. 4273.

HENRY LOCKHART *vs.* J. Q. WILLS ET AL. } No. 4275.

Upon motion — the said plaintiffs, in the three last above and foregoing causes.

It is ordered by the court that the said defendants in said causes show cause on November third, next, why said causes should not be consolidated.

And thereafter, on, to-wit, the 26th day of August, 1899, there was made and entered of record in vacation, an order of the court in said cause, which order is in the words and figures following, to-wit:

HENRY LOCKHART *vs.* J. Q. WILLS ET AL. } No. 4275.

This cause coming on for hearing upon motion of defendants to dismiss the same for the reasons set forth in their motion, and the court being fully advised and after hearing counsel for the respective parties, does sustain said motion, and said cause be and the same is hereby dismissed at the cost of the plaintiff, with leave to re-instate said cause upon the docket should the ejectment suit be decided in favor of plaintiff.

(Signed) J. W. CRUMPACKER, *Judge.*

100 And thereafter, to-wit, on the 26th day of August, 1899, there was made and entered of record, in vacation, an order of the court in said cause, sustaining defendants' demurrer to the second amended bill of complaint, which said order is in the words and figures following, to-wit:

HENRY LOCKHART
vs.
H. C. LEEDS ET AL. } No. 3888.

This cause coming on for hearing upon the demurrer filed by the defendants to the complainant's second amended bill of complaint, and the court, after hearing counsel for the respective parties, being fully advised, doth sustain said demurrer; and upon motion of defendants, said complaint is hereby dismissed, at the cost of the plaintiff, and that defendants recover their costs in said cause laid out and expended.

(Signed) J. W. CRUMPACKER, *Judge.*

And thereafter, to-wit, on the 12th day of October, A. D. 1899, there was filed in the office of the clerk of the said court in the said cause a motion for appeal, which said motion is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the Second Judicial District Court.

HENRY LOCKHART
vs.
H. C. LEEDS ET AL. } No. 3888. Chancery.

Now comes the plaintiff herein, by H. B. Fergusson, one of his attorneys, and prays an appeal to the supreme court of the Territory of New Mexico, from the order and judgment made and entered of record in the above entitled cause, on, to-wit, August 26th, 1899.

101 (Signed) H. B. FERGUSSON,
Attorney for Plaintiff.

(Endorsed: No. 3888. Filed in my office this October 12th, 1899. Harry P. Owen, clerk.)

And thereafter, on, to-wit, the regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, at the court house of the said county, on the 13th day of October, 1899, and being the twenty-third day of the said term, the following proceedings, among others, were had and entered of record:

Present: The Honorable Jonathan W. Crumpacker, associate justice of the supreme court of the Territory of New Mexico, and judge of the second judicial district court thereof.

HENRY LOCKHART
vs.
H. C. LEEDS ET AL. } No. 3888.

This cause coming on to be heard upon the motion and application of the complainant and plaintiff herein for an appeal of this cause to the supreme court of the Territory of New Mexico, it is hereby ordered by the court that said motion and application be granted, and the appeal in said cause is hereby allowed.

TERRITORY OF NEW MEXICO, } *ss:*
County of Bernalillo, }

Second Judicial District Court.

I, Harry P. Owen, clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, do hereby certify that the above and foregoing is a true and correct transcript of the record and proceedings had in
102 the cause lately pending in the said district court for the county of Bernalillo, wherein Henry Lockhart was the plaintiff, and H. C. Leeds, J. A. Johnson, Julia A. Johnson, J. Q. Wills, Charles Pilkey, Frank Fagaly, Lee Walker, and Charles Bonsall, receiver, W. B. Childers and E. W. Dobson, were defendants, as the same appears of record and from the files in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court, this 9th day of December, A. D. 1899.

HARRY P. OWEN, *Clerk.*

103 And afterwards, on to-wit the said 21st day of December, A. D., 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, an assignment of error, which said assignment of error, was and is in words and figures, following, to-wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1900.

HENRY LOCKHART, Plaintiff and Appellant,
vs.
H. C. LEEDS ET AL., Defendants and Appellees. } No. 868. Appeal from District Court, Bernalillo County.

Assignment of Errors.

Now comes the appellant, plaintiff below, and says there is manifest error in the record and proceedings in said cause in the court below, in this, to-wit:

1. That court erred in entering the order of dismissal of said action (Transcript of Record page 101).

2. The court errred in sustaining the demurrer of defendants below to the complaint, amended complaint and the second amended complaint (Record pp. 57 and 101)

3. The court erred in other proceedings in said cause apparent upon the record, (Transcript of Record pp. 100–82)

(Signed) WARREN & CHAVEZ,
Attorneys for Appellant.
FERGUSSON & GILLETT,
Attorneys for Appellant.

104 And afterwards, on to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, the same being the 3rd day of January, A. D. 1900, on the thirtieth day of said regular term, the same being the 6th day of February, A. D., 1900, the following among other proceedings were had, to-wit:

HENRY LOCKHART, Appellant,
vs.
H. C. LEEDS ET AL., Appellees. } No. 868. Appeal from District Court, Bernalillo County.

This cause coming on to be heard upon the transcript of record assignment of errors and briefs of counsel, is argued by W. B. Childers, Esq., for appellees, and H. B. Fergusson, for appellants, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same into advisement.

And afterwards, on to wit, the said regular term of the supreme court of the Territory of New Mexico, on the thirty-ninth day thereof, the same being the 24th day of August, A. D., 1900 the following amont other proceedings, were had and entered of record as follows, to wit:—

HENRY LOCKHART, Appellant,
vs.
H. C. LEEDS ET AL., Appellees. } No. 868. Appeal from District Court, Bernalillo County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of
105 the present term, the court being now sufficiently advised in the premises, announces its decision, by Associate Justice Parker, Chief Justice Mills, and Associate Justices McFie concur-ing, affirming the judgment of the court below, for reasons stated in the opinion of the court on file; it is therefore considered and adjudged by the court, that the judgment of the district court in and for the county of Bernalillo whence this cause came into this court, be and the same, hereby is affirmed, and that in accordance therewith, it is considered and adjudged by the court that this cause — hereby dismissed at the cost of the said appellant, and that execution issue therefore, and it is so ordered.

And afterwards, on to-wit, the 5th day of August A. D. 1902, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, an order allowing an appeal to the Supreme Court of the United States, made in vacation, which said order is in words and figures, following, to wit:—

In the Supreme Court of the Territory of New Mexico.

HENRY LOCKHART, Appellant,
vs.
H. C. LEEDS ET AL., Appellees. } No. 868. In Chancery.

Now comes the appellant herein, by H. B. Fergusson his attorney and prays an appeal to the Supreme Court of the United States of America, from the order and judgment made and entered of record in the above entitled cause, on to wit, the 24th day of August, 1900.

H. B. FERGUSSON,
Attorney for Appellant.

106 This cause coming on to be heard upon the motion and application of the appellant in the above entitled cause for an appeal of this cause to the Supreme Court of the United States of America, from the order and decision of this court made and entered of record on the 24th day of August, 1900, it is hereby ordered by the court that said motion and application be and the same hereby is granted and allowed.

(Signed) WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico.

August 2nd, 1902.

And afterwards, on to-wit, at the said regular term of the supreme court, in vacation thereof, on the 5th day of August, A. D. 1902, there was entered of record the following order of allowance of an appeal, as follows, to-wit:

HENRY LOCKHART, Appellant
vs.
H. C. LEEDS ET AL., Appellee. } No. 868. Appeal from District Court, Bernalillo County.

This cause coming on to be heard upon a motion and application of the appellant in the above entitled cause, for an appeal of this cause to the Supreme Court of the United States, of America, from the order and decision of this court made and entered of record on the 24th day of August, 1900, it is hereby ordered, by the court, that said motion and application be and the same is hereby granted and allowed.

WILLIAM J. MILLS,
Chief Justice of the Supreme Court, Territory of New Mexico.

August 2nd, 1902.

107 And afterwards, on to wit, on the 24th day of August, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, an opinion by the court which said opinion was and is in the following words and figures, to-wit:—

108 In the Supreme Court of the Territory of New Mexico, January Term, 1900.

HENRY LOCKHART, Appellant,
vs.
H. C. LEEDS ET ALS., Appellees.
} No. 868. Appeal from District Court, Bernalillo County.

Warren & Chaves, and Fergusson & Gillett, attorneys for appellant.

Childers & Dobson, attorneys for appellees.

Statement of Facts

The appellant filed a bill in equity in this case on the 26th day of May, 1894, to which the defendants demurred and the demurrer was sustained. Thereafter he filed an amended bill, to which a demurrer was also filed and sustained, and on January, 6th, 1896, the appellant, filed a "second" amended bill, to which a demurrer was also filed, and was sustained by the court on the 16th day of August, 1899, and the case dismissed. From the action of the court in sustaining the demurrer to the second amended bill, this appeal was taken.

The second amended bill in substance alleges, that on May 7th 1893, the appellant entered into an agreement in writing with one Ben Johnson and Charles Pilkey, whereby the said Pilkey agreed with the appellant and Johnson to enter into a co-partnership for the purpose of discovering, locating and operating mining claims; that Pilkey should prospect and locate such veins, lodes and places as he may discover or know the existence of, containing valuable ores or minerals, in the name of and for the joint benefit of the parties thereto. The appellant and Johnson were to furnish certain articles therein mentioned, 25 lbs. of powder, 100 ft. of fuse, 1 box caps, 1 hammer, — lbs. of drill steel, 1 pick, and when he should have sunk or driven a shaft or tunnel 4 ft. by 6 ft. in the vein of mineral bearing quartz to a depth of twenty feet from the lowest level of the surface at its mouth such vein and locality to be designated by the appellant and Johnson, he was to receive
109 in addition, the sum of thirty dollars, less any moneys or provisions or other articles, except as above mentioned; that said work should begin within twenty days from the date of the agreement, and be prosecuted with due diligence to a completion and to the satisfaction of the said appellant and Johnson. Pilkey was to furnish the said appellant and Johnson, from time to time at their request, samples of all ores or minerals discovered or taken out of

any workings. It also provided that it should be at the option of said appellant and Johnson to continue the work or abandon any claims located, at any time they might deem proper. The agreement was to continue in force for one year from its date, and all discoveries or locations made during that time by said Pilkey were to be covered by the agreement. "Any concealment of a discovery or failure to locate a valuable mineral claim for the purpose of evading the terms of this agreement and defrauding the said second parties shall work a forfeiture of any right or interest direct or indirect, that such first party might have or afterwards obtain to and for the benefit" of said appellant and Johnson. This agreement was dated May 7th, 1893.

The bill alleges that the plaintiff and Johnson delivered the articles and provisions mentioned in the contract, and paid the money, and divers other sums of money to and for the said Pilkey, and in all respects kept and performed the said agreement upon their part. It further alleges, that under this agreement, Pilkey located a claim in the name of himself, the appellant, and Johnson, on July 10th, 1893, called it the "Sampson," and that a copy of the location notice is filed as Exhibit "B" to the bill; that he posted that location notice on the said claim, marked the boundaries on the ground, transmitted at the request of appellant and Johnson samples of the ore, and sunk a shaft or cut on said claim to the depth of ten feet, showing mineral in place within less than ninety days from the time of taking possession of said lode. It further alleges, that the discoverers and locators of said claim, not then knowing whether the said mineral was situated upon the public domain of the United States, and so free and open to location under the mining laws of the United States, performed the required acts of location under the said laws and the laws of the Territory and were ready, able and willing in all things to comply therewith, and would have done so, except for the fraudulent and unlawful acts of the defendants therein mentioned. The bill alleged the performance of every necessary act to constitute a valid location, except the recording in the proper recorder's office of the location notice. It further alleges, that on or about October 1st, 1893, the defendant Pilkey, while so in possession of the said lode, ledge or lead, under and in pursuance of said agreement, wrongfully and fraudulently conspired with the defendants Leeds, J. A. Johnson, Fagaley and Walker, to defraud the appellant and the said Johnson of their interest in and title to the said mines and minerals, discovered and possessed by them as aforesaid, of which the said Pilkey, as the partner and co-owner with your orator, was then in pursuance of said conspiracy and confederation in possession, and on, to-wit October first, 1893, the precise date whereof being unknown to your orator, an agreement was made and entered into by the defendants Fagaley, J. A. Johnson, Walker and Leeds, and the defendant Pilkey, by which it was agreed that the said Pilkey in violation and fraud of the rights of your orator in and to the said mine of which he was then in possession as aforesaid, by him discovered

and held under said agreement, should transfer, convey and deliver possession of said mine to the last named defendant without the knowledge or consent of your orator and the said Johnson, and that they should do and perform all other acts deemed necessary for that purpose. And the bill further states, "that the said complainant (meaning Pilkey) by an instrument in writing the precise terms of which are unknown to complainant the same being in possession of defendants or some of them, sold, transferred and conveyed to the defendants Fagaley, J. A. Johnson, Leeds and Walker an undivided four-fifths interest in said mine and mineral, the said Pilkey retaining an undivided one-fifth interest therein, which was conveyed to said Walker by said instrument and by him held in secret trust for said Pilkey, and in pursuance of said fraudulent combination and conspiracy, the defendants Frank Fagaley, J. A. Johnson, Lee Walker and H. C. Leeds, together with the defendant J. Q. Wills,
111 caused and procured the defendant Pilkey to stop work upon the said mines under his said agreement and to fail and neglect to record the said location notice, so by him posted thereon as aforesaid, and the said defendants or some of them wrongfully removed the said location notice from said claim and said defendants covered up or concealed the said workings thereon, theretofore done and performed by defendant Pilkey, and without the knowledge or consent of your orator and the said Johnson, entered into and upon the said lead, lode, ledge and deposit bearing gold and silver, and upon the said parcel or surface ground, including the same mentioned and described in said location notice, and known as the "Sampson mine," and denied and still deny that your orator had or has any interest therein, and thereafter, having so procured possession of the same, the said defendants in pursuance of said confederacy, caused to be posted upon said mine a location notice, and filed the same for record in the recorder's office of said county" etc., a copy of which is filed and made a part of the bill, etc., and "thereby said defendants claimed to have located the said lode for the benefit of themselves as locators * * * under the mining laws of the United States, and called and designated the same as the "Washington lode." The bill then alleges that the said defendants agreed among themselves as to the respective interest each of them should have in said location, and that the said Pilkey should be entitled to a one-fifth interest therein, but that the said last named interest should be claimed and held by said Walker in trust for him.

The bill then alleges that the ground upon which these locations were made is situated within the exterior boundaries of a tract of land claimed to have been granted in 1728, by the then Spanish authorities, to one Antonio Lucero, and that the same was, at the time of the making of said locations, claimed by certain persons under said alleged grant, and that claims were then, and at the time of the filing of said amended bill, pending in the United States Court of Private Land Claims, and undetermined; and further alleges, that neither the said

Antonio Lucero, nor his heirs or successors had become entitled
112 in law or equity to the minerals contained therein, and that by virtue of the location of the said "Sampson" claim by the said Pilkey, under the said agreement with the appellant, the appellant became and now is equitably entitled to the minerals contained therein, and had a paramount right and title in and to the same, as against the said defendants or any or either of them. It also alleges that the other defendants named in the bill claim some right or interest in and to said mining claim known as the Washington, derived through their co-defendants. It alleges that the mineral deposit so discovered by said Pilkey was not and is not subject to location as a mining claim under and in pursuance of the laws of the United States, because the same is situate within the said alleged private land grant, and that by virtue of the said prior discovery, possession and working of the said mining claim by the said Pilkey under said agreement, the appellant became and was and is equitably entitled to the minerals contained in said location as against the said defendants, or any other persons, except the Government of the United States. The bill also alleges, that the appellant, by virtue of conveyances, had acquired an undivided title and interest as tenant in common in said private land claim, superior to any title or right thereto on the part of the defendants, or either of them, and is lawfully entitled to enter upon and work the said mine.

The bill also alleges, that after the removal by the said defendants of the said location notice, posted as aforesaid by Pilkey, a copy thereof was procured by the appellant and filed and recorded in the office of the recorder of the county of Bernalillo in which the same was situate.

The bill further alleges, that the appellant, by virtue of the facts alleged in the said bill, became the equitable owner of the mineral in said claim, and had a preferential right to acquire the legal title to the same from the United States, and that the location thereof under the name of the Washington by the defendants was wholly inoperative and void, and that the said Pilkey, by reason of his participation in the said fraudulent conspiracy and combination,
113 by virtue of the said agreement with the appellant and Ben Johnson, had forfeited all right or interest, direct or indirect, in and to the said Sampson mine, and that the said defendants claimed that the said Washington location was a valid location and denied the appellant had any interest therein, and excluded him from the possession thereof. The bill also alleged the insolvency of some of the defendants, and that the appellant would suffer irreparable injury unless the defendants were enjoined from working the same.

The bill then prays for the appointment of a receiver to take possession of the said Sampson mine, and that the said transfer and conveyance executed by said Pilkey to said Fagaly, Leeds, J. A. Johnson, and Walker be declared fraudulent and void as against him, and that it be cancelled and annulled; and that the location notice of the Washington lode be decreed to be void and of no effect

as against the appellant; and that the defendants be enjoined from mining, working or removing from the said Washington lode any ore; and that he be decreed the equitable owner of the said ore and mineral contained therein; and also for general relief.

To this bill the defendants filed a demurrer, among others, upon the following grounds: That the bill did not allege that the defendants entered upon the mining claim within three months after the said mining claim is alleged to have been located under the name of the "Sampson;" that it appeared that no valid location notice was ever posted upon the surface of said claim or recorded in the recorder's office, as required by law; and because the agreement alleged to have been between plaintiff and Ben Johnson and defendant Pilkey, was subject to revocation by either party thereto at any time; and that the facts alleged in the amended bill amounted to an abandonment of said alleged "Sampson" claim under the terms of his alleged agreement; and because it did not appear from the allegations in the bill, that at the time of the alleged entry of the defendants on this exact mining claim, the complainant and his co-locators, under the alleged Sampson location, were — possession of the said mining claim or any part thereof, or had any lawful right to the possession thereof; and because the complainant's remedy was at law, and that the amended bill did not state
114 a case for a court of equity.

The assignment of error by the appellant are, that the court erred in sustaining the demurrer of the defendants to the plaintiff's "second" amended complaint, and ordering the dismissal of the said case.

Opinion of the Court.

PARKER, *J.:*

The question to be determined is whether the appellant has by his bill stated a case which entitles him to any relief in a court of equity. A suit in ejectment involving the same mining claim, which is the subject of the litigation, was before this court, and the opinion deciding it will be found reported under the title of Lockhart *vs.* Wills, 54 Pac. Rep. 336. The appellees contend that upon the allegations of the bill, the remedy of the appellant is at law, and not in equity. We think this contention is well founded, and that the action of the court in sustaining the demurrer was correct. In the case of Lockhart *vs.* Wills, *supra*, we held that the ground in controversy was subject to location under the mining laws of the United States. In that case it was stipulated by the parties that the decree of the Court of Private Land Claims within which it was alleged the ground in controversy was located, eliminated the mine from the grant. We held, however, that although that decree had not been rendered at the time *of* the attempted locations of the "Sampson" and "Washington" mines were made, nevertheless, the ground was subject to exploration, location and entry under the mining laws of the United States. After fully discussing the contention of the parties and the law applicable to the facts, we said: "We conclude

that they" (lands within unconfirmed Mexican or Spanish grants) "are not reserved lands and are 'lands belonging to the United States' within the meaning of section 2319 of the Revised Statutes of the United States." We deem it unnecessary to again discuss this question and refer to our opinion in that case.

The demurrer admits the truth of all the allegations in the bill which are well pleaded. If any of the allegations in the bill, however, are ambiguous, they are to be construed more strongly
115 against the appellant. "A demurrer only admits facts well pleaded: it does not admit matters of inference and argument, however clearly stated:" Dillion *vs.* Barnard, 21 Wall., 430. There must be sufficient equity on the facts of the bill to warrant the relief prayed for, and the material facts on which the plaintiff relies must be so distinctly alleged as to put them in issue. Harding *vs.* Handy, 11 Wheat. 103. "The rule is familiar that the court will refuse to decree unless the substantial ground work of the case on which the relief is sought is *distinctly* alleged in the bill:" Pelham *vs.* Edlmyer, 15 Fed. Rep. 262. "It may be affirmed as an elementary rule of the most extensice influence, that the bill should state the right, title or claim of the plaintiff with accuracy, and clearness, and that it should in like manner, state the injury or grievance of which he complains, and the relief which he asks of the court:" Story on Equity Plead. sec. 241. Applying these principles to the allegations of the bill, we find that the bill alleges that the defendant Pilkey under the contract between him and the appellant and Ben Johnson, loccated the "Sampson mine," and performed all the acts necessary to complete a valid location, except the filing of the location notice in the county recorder's office within ninety days after the making of the location, on July 10th, 1893. It alleges that the defendants caused and procured the defendant Pilkey "to fail and neglect to record the said location notice so by him posted thereon as aforesaid, and the said defendants or some of them wrongfully removed the said location notice from said claim, and after the removal of said location notice * * * a copy thereof was procured by your oratos * * * and the same was filed in the office of the recorder on December 9th, 1893." It fails to allege when the posted copy was removed, or when the copy filed for record was procured by the appellant. So far as the allegations of the bill are concearned, the copy may have been in possession of the appellant long before the expiration of the ninety days within which the law required it to be filed. It was certainly within the power of the defendant to have definitely alleged when he procured this copy, and thereby show, if such was the fact, that he did not file it sooner because he could not obtain it. He does not allege how or from whom he obtained it.

116 The failure to file a location notice for record works a forfeiture of a mining location, and leaves the claim open to relocation, Lockhart *vs.* Will, *supra.* There is no allegation in the bill showing that the appellant could not himself have filed this location notice for record within the ninety days. It contains no alle-

gation that appellant relied upon the defendant Pilkey to file it. It is true that there is an allegation that the defendants caused and procured the defendant Pilkey to fail and neglect to record it, but this in the absence of an allegation that the appellant was relying upon the defendant to file it, does not account for the delay in doing so until December 9th, following. The bill alleges "that on or about the first of October, 1893, the precise date thereof being unknown" to appellant, an agreement was made and entered into by some of the defendants with Pilkey who was then in possession of the mine, that he should transfer and deliver possession of the said mine to the last named defendant and Ben Johnson and by an instrument in writing, the precise terms of which he cannot set up, because it is in possession of the defendants, Pilkey, conveyed an undivided four-fifths interest in said Sampson mine to the defendants, retaining one fourth conveyed to defendant Walker to be held in secret trust by Walker for said Pilkey, and that in pursuance of said agreement they procured the defendant Pilkey to withhold said location notice from record." This allegation does not, however, excuse the absence of the allegations in the bill as to delay in filing the notice already pointed out.

The bill alleges that the defendants entered into the possession of the mine under this agreement, but it does not allege when the defendants so entered into possession of said mine. This is an important allegation. Appell-nt's counsel insists that possession was so taken after the expiration of the 10th day of October, within ninety days from the location of the "Sampson." There is no allegation in the bill upon which to base this contention. Counsel appeals to the first ground stated in defendants' demurrer as
117 establishing this fact. We do not know of any principle of pleading by which defective allegations in a bill can be aided by a demurrer filed to it.

2. Under the allegations of the bill, if the defendants, by collusion with Pilkey or otherwise, intruded upon the possession of the appellant, which the bill alleges was actually held by Pilkey under the terms of the contract, up to the time of the actual entry and exclusion of the appellant and his cotenant, Johnson, by the defendants, the appellant could recover possession in an action at law. This action could be sustained both against Pilkey and the defendants entering under him. If Pilkey made the agreement alleged in the bill, the defendant*d* became cotena-ts with the appellant. Pilkey could by the conveyance alleged in the bill only convey his undivided third interest, and ejectment lies against a cotenant, or a grantee of a cotenant attempting to hold adversely to his cotenants. Prior possession under such circumstances is sufficient to maintain ejectment. Freeman on Cotenancy and Part. sec. 290; Cristy *v.* Scott, 14 How., 282; Burt *v.* Panjaud, 99 U. S. 180; Campbell *v.* Rankin, 99 U. S. 261. In a similar case it is said: "Claiming, as both parties did, under Payne and Cook, the regularity of the location of the mining claims, are not in question, and when in 1862 the plaintiff purchased from one of the owners of the claim an un-

divided interest therein, and went into possession with his grantor and with others deriving title from the original locators * * * he became a tenant in common with those who were then the owners. He was such when the Union Gold and Silver Mining Company purchased the interest of other owners. By that purchase, that company succeeded to a tenancy in common with him and so did the defendant, when it became the purchaser. * * * The possession of his co-tenants was his possession. They held it for him until he was ousted. That this is a settled rule of law is not denied." Mining Co. *v.* Taylor, 100 U. S. 40. The only acts alleged in the bill as having been done by Pilkey which deprived the appellant of his rights are the surrender of the possession and the failure to record the location notice.

118 3. If Pilkey surrendered the possession prior to the 10th day of October 1893, the appellant would, in an action of ejectment, be excused from perfecting his location. In such a case the Supreme Court of the United States has said: "They could not be deprived of their inchoate rights by the tortious acts of others; nor could the intruders and trespasse-s initiate any rights which would defeat those of the prior discoverers." Erhardt *v.* Boare, 113 U. S. 534. "A location can only be made where the law allows it to be done. Ant attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done." Balk *v.* Meagher, 104 U. S. 284. "The record shows actual possession in the appellees. which is *prima facie* evidence of title, and as we said in Lebanon M. Co. *vs.* Con. Rep. M. Co., 6 Colo. 380, 'entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession, amounts only to a trespass, and cannot form the basis for the acquisition of a title.'" Weise *v.* Barker, 7 Colo., 178, 2 Pac. Rep. 921.

We think it clear that under the allegations of the bill the appellant could obtain the relief actually prayed for in an action at law. Neither the alleged contract of Pilkey with the defendants, or any other fact alleged would prevent him from obtaining a plain, speedy and adequate remedy by a suit in ejectment.

4. The allegations do not show such a state of facts as would justify the granting of an injunction or the appointment of a receiver. This relief could only be had, provided the bill contained proper allegations, and was filed in aid of a suit at law. Fussell *v.* Gregg, 113 U. S., 554–5; Hipp *v.* Babin, 19 How., 271; Parker *v.* Man'f'g Co., 2 Black 545; Grand Chute *v.* Winger, 15 Wal., 373; Lewis *v.* Cocks, 23 Wal., 466; Killian *v.* Ebbinghaus, 110 U. S., 568. A bill for injunction cannot be maintained simply as a substitute for an action of ejectment.

5. The bill prays that the Washington location be declared void, and for possession. The appellant now asks under the
119 prayer for general relief that the Washington location be held valid, and the holders thereof be held as constructive

truetess. The allegations in the bill do not justify any such relief. It is essential that the facts and circumstances which constitute the fraud complained of should be set out clearly, concisely and with sufficient precision to apprise the opposite party of *what he is called* upon to answer. 9 English Enc. of Plead. & Pr., 687 and many authorities there cited. Charging generally that what was done was "colorable fraud," "a breach of trust" and a "scheme" themselves are allegations of legal conclusion which a demurrer does not admit. Fogg. *vs.* Blair, 139 U. S., 127; Van Weel *v.* Winston, 115, U. S. 237; Brooks *v.* O'Hara, 8 Fed. Rep, 532; Phelps *v.* Elliott, 35 Fed. Rep. 455; Lafayette Co. *vs.* Neeley, 21 Fed. Rep. 744. For the purpose of sustaining this contention, the appellant now insists that the intrusion of the defendants upon the possession of appellant took place after the tenth day of October. As already shown, if it took place before that date it would be tortious and the rights of the appellant would not be thereby affected. The bill is fatally defective for not alleging conclusive- whether it took place before or after that date. In the prayer for general relief, only such relief as is agreeable to the case made by the bill can be granted. English *v.* Foxall, 2 Peters, 612; Hobson *v.* McArthur's Heirs, 16 Peters 182; Boon *v.* Childs, 10 Peters, 177. "Now it is perfectly clear, according to the practice of the court, where a specific relief is prayed for, even though there be a prayer for general relief, the court cannot grant relief which is inconsistent with, or entirely different from that which is asked for." Wilson *v.* Graham, 4 Wash. C. C., 53; 30 Fed. Cases No. 17,804. "It is true that there was a prayer for general relief, but relief given under the general prayer must be agreeable to the cases made by the bill." Allen *v.* Pullman Palace Car Co., 139 U. S. 662; Hayward *v.* National Bank, and authorities cited, 96 U. S., 614; Georgia *v.* Stanton, 6 Wall., 77. "In order to entitle a plaintiff to a decree under the general prayer, different from that specifically prayed, the allegations relied upon must not only be such as afford a ground for relief sought, but they must have been introduced into the bill for the purpose of showing a claim for relief and not for the mere purpose of corroborating the plaintiff's right to the
120 specific relief prayed, otherwise the court would take the defendant by surprise, which is contrar*t* to its principles." 1 Daniel's Ch. Pr. 386; Curry *v.* Lloys, 22 Fed. Rep. 264. "But, even, when a prayer for general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the court will grant such relief only, as the case stated will justify; and will not ordinarily be so indulgent, as to permit a bill framed for one purpose to answer another, e-pecially if the defendant may be surprised or prejudiced thereby." Story Eq. Plead. sec. 42; 3 Ency. Pl. & Prac., 350, *et seq.*, and notes. The allegations contained in the bill are not adapted to the relief now urged by counsel for appellant in his brief. The bill was not framed to secure the holding of Pilkey or any other defendant as a trustee under the Washington location.

6. The bill prays that the instrument of writing alleged to have

been executed by the defendant Pilkey, conveying to his co-defendants interest in the "Sampson" location, be declared fraudulent and *void* as against the plaintiff, and that it be cancelled and annulled. This agreement was not upon record, and is not a cloud upon the title of the plaintiff. It in no way prevents him from recovering possession in an action at law. It could convey as against the appellant, only the interest which the defendant Pilkey had in the Sampson, Hartford &c. Ore Co., *v.* Miller, 3 Mor. Min. Rep., 353. "The facts set forth in the bill of the plaintiff clearly show that he has a plain, adequate and complete remedy at law for the injuries of which he complains. He alleges that he is the owner in fee, as trustee, of certain described lands in Iowa, and his injuries consist in this: That the defendants are in the possession and enjoyment of the property claiming title under certain documents purporting to transfer the same, which are fraudulent and void. If he is the owner in fee of the premises, he can establish that fact in an action at law, and if the evidences of the defendants' asserted title are fraudulent and void, that he can also show. There is no occasion for resort to a court of equity, either to establish his right to the land or to put him in possession thereof." Whitehead *vs.* Shattuck, 138, U. S. 150.

121 7. It is also contended that this bill can be sustained under section 4010, of the Compiled Laws of New Mexico, relating to suits to quiet title. We do not think that the allegations contained in the bill bring appellant's case within the provisions of this statute. They do not show why he cannot recover in a suit at law. Neither does the allegation of membership of an interest in an unconfirmed grant entitle the appellant to such relief. Pinkerton *vs.* Ledoux, 129 U. S. 351; Astiasaran *vs.* Santa Rita Mng. Co., 148 U. S. 80. These cases hold that until the question of title to a- unconfirmed grant had been settled by Congress or the tribunal established by it for that purpose, it cannot be contested in the ordinary courts of justice.

For the reasons above stated, we are lead to the conclusion that the ruling of the court below in sustaining the demurrer to the second amended bill of complaint and dismissing the suit was correct, and the decree of the court is therefore affirmed.

FRANK W. PARKER,
Associate Justice.

We concur:
WILLIAM J. MILLS, *C. J.*
JOHN R. McFIE, *A. J.*

Crumpacker J. having heard the case belos, and Leland J., being absend did not participate in this decision.

122 TERRITORY OF NEW MEXICO, } ss:
Supreme Court, }

I, —— ——, clerk of the supreme court of the Territory of New Mexico do hereby certify that the foregoing 121 pages contain a full true and perfect copy of the record and proceedings, pleadings and opinion filed in the above entitled cause which is transmitted to the Supreme Court of the United States, in accordance with an order granting an appeal herein taken.

Witness, my hand and the seal of the supreme court of the Territory of New Mexico, this the 6th day of August A. D., 1902.

Seal Supreme Court, Territory of New Mexico.

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

123 THE UNITED STATES OF AMERICA:

To H. C. Leeds, J. A. Johnson, Julia A. Johnson, James Q. Wills, Charles Pilkey, Frank Fagalay, Lee Walker, and Charles Bonsall, receiver; W. B. Childers, and E. W. Dobson, Greeting:

You and each of you are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington on the first Monday of October next, and to enter your appearance within sixty days from the date hereof, pursuant to an appeal sued out of the supreme court of the Territory of New Mexico, wherein Henry Lockhart was appellant, and H. C. Leeds *et al.* are appellees, to show cause in any there be, why the judgment rendered against said appellants as mentioned in said order of appeal should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this the 7th day of August, A. D., 1902.

Seal Supreme Court, Territory of New Mexico.

WILLIAM J. MILLS,
Chief Justice of the Supreme Court, Territory of New Mexico.

Service of a copy of the above citation acknowledged this 19th day of August, 1902.

W. B. CHILDERS,
Att'y for Appellees.

[Endorsed:] (Original). No. —. In the Supreme Court of the United States, October term, 1902. Henry Lockhart, appellant, vs. H. C. Leeds *et al.*, appellees. Citation.

Endorsed on cover: File No. 18,653. New Mexico Territory Supreme Court. Term No. 121. Henry Lockhart, appellant, vs. H. C. Leeds *et al.* Filed Aug. 25, 1902.

White Supreme Court, U. S.
FILED
OCT 13 1904
JAMES H. MCKENNEY,
Clerk.

HENRY LOCKHART, Appellant,
vs.
H. O. LEEDS ET AL.

No. 10.

HENRY LOCKHART, Appellant,
vs.
H. O. LEEDS ET AL.

No. 269.

Motion to pass No. 10 under Rule 26, and to advance No. 269, that they may be heard as one case.

J. H. McGOWAN,
Attorney for Complainant.

PRESS OF GIBSON BROTHERS.
WASHINGTON, D. C.
1904.

Supreme Court of the United States.

OCTOBER TERM, 1904.

HENRY LOCKHART, APPELLANT, *v.* H. C. LEEDS ET. ALS.	*No.* 10.
HENRY LOCKHART, APPELLANT, *v.* H. C. LEEDS ET. ALS.	*No.* 289.

Motion to pass No. 10 under Rule 26, and to advance No. 289, that they may be heard as one case.

Now comes the complainant in the said cases numbered 10 and 289 on present docket, and moves the court to pass said case numbered 10, under rule 26, and advance case numbered 289, fixing some time during the term, convenient to the Court, when they may be heard together as one case.

STATEMENT.

During the October term, 1900, the ejectment case of Lockhart *v.* Johnson *et als.* (181 U. S., 516) was submitted to and decided by this Court. The parties in that case were the same as the parties in Nos. 10 and 289, and the property in controversy (a mining claim within the exterior limits of a Mexican grant in the Territory of New Mexico), the same.

In the ejectment case this Court held, in substance, that land within a Mexican grant is not thereby reserved from the operation of the mineral laws of the United States. The Court further held that an action of ejectment to recover mining property cannot be maintained on the ground that the defendants have acquired it by a relocation in pursuance of a conspiracy with plaintiff's partner, whereby that partner, who was not one of the relocators, ceased to do the necessary work on the mine and abandoned its possession, since these facts, whatever equities they may raise as against the defendants, give plaintiff no legal title.

The Court also held in the ejectment suit that although the plaintiff had no right to maintain that action, he ought not to be embarrassed by a judgment which would prohibit him from pursuing another remedy to save such equities as he might have, and judgment was entered accordingly.

The complainant now brings to the attention of the Court that he first sought his remedy in the matter by a bill in equity in the District Court of the County of Bernalillo in said Territory, and that the same was ordered dismissed on demurrer, on the ground as alleged by the Court, that complainant had a complete remedy at law. Succeeding this decision an amended bill was filed and was demurred to, but for the time being was allowed to

remain in abeyance in the Court, and in the meantime, following the suggestions of the Court, the ejectment suit was begun and prosecuted to a final judgment by this Court. But before such final judgment was rendered (May 13, 1901) the said amended bill of complaint and the pending demurrer were called up in said District Court for further hearing and the bill ordered to be dismissed, from which decree complainant appealed to the Supreme Court of the Territory, which Court, on August 24, 1900, affirmed said decree.

The ejectment case was then pending in this Court and was not finally decided until more than eight months later. Complainant appealed to this Court from the decree of August 24, 1900, which case is now pending as said Number 10.

But the final decision in the ejectment case on the two points above named, made it desirable, in order that complete justice could be decreed, as complainant was advised by his counsel, to commence new proceedings in equity with such changes in his bill of complaint as were indicated and made necessary by said last-named decision. Such bill was duly filed, was dismissed on demurrer, the decree of the District Court being affirmed by the territorial Supreme Court, and that case is now here on appeal, being the case numbered 289.

From these facts which duly appear in the decision of this court, and in the printed records of Nos. 10 and 289, it is suggested that the Court should not be burdened with two hearings in the one matter, and that complainant should not be put to the hazard of a hearing on his bill in No. 10, which could not be amended after being advised more fully as to his rights in the premises by the decision of this Court in the ejectment case; neither

should complainant be put to the expense of two hearings in the one case.

If the cases could be assigned to a call about midway of the term, say in January, it would seem to serve every requirement of justice, enabling counsel to present the whole matter in one argument.

J. H. McGOWAN,
Attorney for Complainant.

FILED
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JAMES H. MCKENNEY
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Supreme Court of the United States.

October Term, 1904.

HENRY LOCKHART, Appellant,
vs.
H. C. LEEDS, J. A. JOHNSON, JULIA A. JOHNSON, et al's.
No. 10.

BRIEF FOR APPELLANT.

J. H. McGOWAN,
Attorney for Appellant.

WASHINGTON, D. C.
Press of Gibson Brothers
1904.

Supreme Court of the United States.

OCTOBER TERM, 1904.

HENRY LOCKHART, APPELLANT,

v.

H. C. LEEDS, J. A. JOHNSON, JULIA A. JOHNSON, ET ALS.

No. 10.

BRIEF FOR APPELLANT.

STATEMENT.

This is an equity case, brought into this Court on appeal from the Supreme Court of the Territory of New Mexico. The case was begun in the District Court for Bernalillo county, and tried on bill and demurrer.

The bill of complaint as amended (the second amendment) on which the hearing was had, will be found in the Record, beginning on page 34. That part of the Record preceding page 34 has no special bearing on matters to be heard by this Court.

The bill alleges, in substance, that on May 7, 1893, complainant Lockhart, and Benj. Johnson and Chas. S. Pilkey entered into a contract in the nature of a copartnership for the purpose of discovering and locating

mining claims. The contractors were all residents of Bernalillo county, New Mexico.

The contract provided, in substance, that Pilkey should prospect and locate such lode and placer claims as he might discover or know the existence of, in the name and for the joint benefit of all said parties, he to own one-third interest in such locations, and Lockhart and Johnson to own an undivided two-thirds interest. The latter parties were to furnish to Pilkey 25 lbs. of giant powder, 100 feet of fuse, one box of caps, one hammer, ——— pounds of drill steel, and one pick.

When Pilkey had sunk or driven a shaft or tunnel four by six feet to a depth of twenty feet from the lowest level of the surface at its mouth upon such vein and locality as should be designated by Lockhart and Johnson, he was to receive from them, in addition to the above-named articles, the sum of thirty dollars, less any money for provisions or other articles, except those above named, which should be furnished to him by them prior to the completion of said work.

The agreement provided that work should begin within twenty days, and should be prosecuted with diligence to the completion, and to the satisfaction of Lockhart and Johnson. Pilkey was to furnish his associates samples of the ore that he should discover, from time to time, on their request.

It was further agreed, that it should be at the option of Lockhart and Johnson to continue working or to abandon any claim located in pursuance of the contract at any time they might deem it proper. The agreement was to continue in force for one year, and all discoveries and locations made by Pilkey during that time were to be considered as covered by it. Pilkey was prohibited from contracting any debt, or making any contract, bind-

ing the other parties to the contract, unless they authorized him to do so in writing. It was also agreed that any concealment by Pilkey of a discovery, or failure to locate a valuable mineral claim, for the purpose of evading the terms of the agreement and defrauding his co-contractors, should result in forfeiting any right or interest, direct or indirect, he might have therein.

The contract was duly executed, and Lockhart and Johnson furnished the supplies and articles as agreed; furnished Pilkey in addition thereto with various provisions, paid him the money mentioned in the contract, and also other sums of money, and in all respects performed the terms of the contract as required on their part, and held themselves in readiness to continue to do so. A copy of the contract, as a part of the bill, is found on page 41 of the Record.

The bill alleges that the parties to this agreement had knowledge or information of the existence of mineral deposits in the northeasterly portion of said Bernalillo county, in the vicinity of the town known as Cochiti, and that it was their purpose that Pilkey should prospect in that vicinity; that he proceeded to said locality, and prior to July 10, 1893, found a lode or vein carrying both gold and silver, and took peaceable possession of a tract thereon 1,500 feet long and 600 feet wide; that in pursuance of the tripartite contract above set forth, and as evidence of such discovery and possession, Pilkey posted a notice on said premises, naming the claim as the "Sampson Mine," declaring it was located July 10, 1893. This notice bore the names of the three parties to the aforesaid contract had two witnesses and purported to be in compliance with the United States and territorial laws applicable thereto, and then in force. The notice is a part of the Record as Exhibit B, and found on page 42.

It is further alleged that Pilkey marked the boundaries of the claim on the ground in such manner that the same could be readily traced. At the request of Lockhart and Johnson he sent them samples of the ore taken from the claim, and in pursuance of their direction commenced sinking a shaft upon the lode to the depth of ten feet from the lowest rim thereof, and appellant is informed and believes and states that he did so sink a shaft to mineral in place, disclosing a large and valuable deposit of gold and silver-bearing ore in place within less than ninety days from the time he so took possession.

The bill states that the parties to said contract, having thus discovered and located said claim, not then knowing whether or not it was situated on public domain, and free and open to location under the mining laws of the United States, still performed the required acts of location under said laws, and the laws of the Territory, "and were ready, able and willing in all things to comply therewith, and would have so done except for the wrongful, fraudulent and unlawful acts of the defendants."

It is then alleged that on or about October 1, 1893, Pilkey, while thus in possession of the said claim in pursuance of the said contract "wrongfully and fraudulently conspired, combined and confederated with the defendants, H. C. Leeds, J. A. Johnson, Frank Fagaley and Lee Walker," to defraud said Lockhart and Benj. Johnson of their interest in and title to said mine and minerals discovered and possessed by them as aforesaid; that Pilkey, in pursuance of said conspiracy, entered into an agreement with said Fagaley, J. A. Johnson, Walker and Leeds, on, to wit, October 1st, 1893, the precise date being unknown to the complainant, in which agreement the defendant, Julia Johnson had some interest; that by this agreement it was provided that Pilkey, in violation and

fraud of the rights of his associates in the contract of May 7, 1893, should transfer, convey and deliver possession of said Samson Mine to said Fagaley, Johnson Walker and Leeds without the knowledge or consent of said Lockhart and Benj. Johnson, and that Pilkey should do whatever else was necessary to carry out the purposes of said conspiracy.

The bill further charges that defendant Pilkey (erroneously named as "complainant," Rec. 37.) "by an instrument in writing, the precise terms of which are unknown to the complainant, the same being in the possession of defendants, or some of them, sold, transferred and conveyed to the defendants, Fagaley, J. A. Johnson, Leeds and Walker, an undivided four-fifths interest in said mine and mineral, the said Pilkey retaining an undivided one-fifth interest therein, which was conveyed to said Walker by said instrument and by him held in secret trust for said Pilkey, and in pursuance of said fraudulent combination and conspiracy" (Rec. 37).

That the defendants, Fagaley, Johnson, Walker and Leeds, together with the defendant J. Q. Wills, "caused and procured the defendant Pilkey to stop work upon the said mines under his said agreement (meaning the agreement with Lockhart and Benj. Johnson) and to fail and neglect to record the said location notice, so by him posted thereon as aforesaid;" that some of the defendants removed the said location notice from the claim, and the defendants covered up or concealed the workings thereon which had been done and performed by Pilkey, and by collusion with him, without the knowledge or consent of the other parties to the contract of May 7, 1893, entered upon the Sampson Mine as heretofore described, and denied and continue to deny that said Lockhart and Benj. Johnson had any interest therein (Rec. 37.)

Having so procured possession of said mine, the said defendants, in pursuance of the conspiracy, caused to be posted upon said mine a location notice and filed the same for record in the recorder's office of said county, December 13 (30), 1893, and caused it to be recorded in book E, page 576, of mining records (Rec. 37). A copy of this notice is made a part of the bill of complaint herein and is found in the Record, as Exhibit C, page 43.

The complaint further states that the defendants, after taking possession, designated the mine in question as the "Washington Lode," but in the alleged location notice, copy of which is found on pages 43 and 44 of the Record, it is named the "Sunny South Lode." It is also disclosed (p. 44) that that notice is an amended one, the original having been made October 20, 1893.

The bill further sets out (foot of p. 37) that it was agreed between said alleged conspirators that for the purpose of concealing the interest of said Pilkey in said pretended location, that defendants Fagaley, Johnson, Walker and Leeds should each have one-fifth interest in the said mine and Pilkey should be entitled to the remaining one-fifth, which should be held in trust for him by said Walker.

The bill after having set out the foregoing facts, alleges that Benj. Johnson had conveyed all his interest in the premises to the complainant Lockhart; and then calls attention to the *Canada de Cochiti* grant, the exterior boundaries of which were supposed to include the location in question, but claims that this grant did not affect the complainant's rights in the premises, but insists that he is equitably entitled to the minerals contained in the claim, and has a prior and paramount right and title thereto as against the defendants or any or either of them (Rec. 38).

The claimed rights of all the defendants, other than Fagaley, Johnson, Walker, and Leeds, were derived di-

rectly or indirectly from them, as the alleged conspirators, and with full notice and knowledge of the rights of the complainant and of his aforesaid agreement with said Pilkey (Rec. 38).

At the foot of page 38 *et seq.*, it is set forth that complainant was advised that the mineral deposit so discovered and located by the said Pilkey was not subject to location as a mining claim under the laws of the United States for the reason that the same was situated within the alleged private grant to Antonio Lucero (the Cochiti grant) but insists that by virtue of the said prior discovery and possession of said claim and the work done upon it, the complainant became entitled to an equitable right that was not terminated by the conduct of Pilkey and his co-conspirators.

It is disclosed that defendant James Q. Wills commenced suit against defendants Leeds, J. A. Johnson, Julia Johnson, Wills, Fagaley, Walker, Pilkey and others wherein the title to the aforesaid, mine was said to be involved, and in said cause the Court appointed one Charles Bonsall as receiver of said mine, and hence he as such receiver was made a defendant herein (Rec. 39).

A copy of the location notice posted by Pilkey and removed by defendant (Exhibit B, p. 42) was duly recorded in the office of the recorder of Bernalillo county on December 9, 1893.

By virtue of the facts thus set out in the bill, the complainant claims to be the equitable owner of the mine in question, and entitled to the possession of it; that the pretended location by four of the five conspirators, namely, Fagaley, Johnson, Walker, and Leeds, was void; that Pilkey, by his conduct, has forfeited all rights in the premises, but that the defendants have refused to permit the complainant to enter upon or work the said claim.

In conclusion of the allegations of the bill, it is set forth that said mining claim is only valuable for the ores and minerals contained therein, and that the defendants are removing these.

It is prayed that defendants be required to answer without oath; that a receiver be appointed to take possession of the property in dispute, and hold such possession until the further order of the Court; that the contract between Pilkey, Fagaley, Johnson, Walker, and Leeds be decreed to be void and cancelled and annulled; that the location notice which the last-named defendants filed in the recorder's office be decreed to be void and of no effect as against complainant; that the defendants be enjoined from working the mine or removing the mineral therefrom; that the complainant be decreed to be the equitable owner of the ore and minerals contained therein, and entitled to the prior and preferential right to acquire the legal title from the United States, "and for such other and further relief as may be equitable and proper in the premises."

To this bill of complaint the defendants demurred, setting out *nine* alleged causes for demurrer (Record, 47 and 48). The cause went to hearing in the District Court on bill and demurrer, the demurrer was sustained and the bill ordered to be dismissed (Rec. 60).

From this order the complainant appealed, and the cause being heard in the Supreme Court of the Territory, the judgment of the District Court was affirmed (Rec. 62), and thereupon the case duly appealed to this Court (Rec. 63). The statement of facts and opinion of said Supreme Court are found on pp. 64, *et seq.*

An ejectment suit relating to this same property, and in which the plaintiff was the complainant herein, and the defendants substantially the same as in this cause, was

heard in this Court on appeal during the October term of 1900, and is reported in 181 U. S. 516. In that case this Court decided in substance that (1) the fact that the premises here in dispute were within the exterior limits of the *Canada le Cochiti* grant did not withdraw the land from entry under the mineral laws of the United States, and (2) that an action of ejectment to recover said mine could not be maintained on the facts disclosed by the record in that case, and the plaintiff must seek whatever remedy he might have in some tribunal other than a court of law.

The law, as found in that case, removes from consideration in this cause the special causes for demurrer numbered 5, 7, 8 and 9, as set out by the defendants on pages 47 and 48 of the present Record. These four alleged causes of demurrer are as follows:

5. Because it does not appear from said amended bill when the complainant acquired an undivided interest in said alleged grant with the heirs of Antonio Lucero, deceased, or what the nature, extent and amount of said interest is, or through what *mean conveyance* it was acquired.

7. Because it does not appear from the allegations in said amended bill that the defendants are not co-tenants with the heirs of Antonio Lucero, deceased, and have a larger interest and a better right to the possession of the surface ground of said claim than the complainant.

8. Because ownership in said alleged grant confers no interest in the mineral thereon, or the right to mine the same.

9. Because the complainant's remedy is at law and the amended bill does not state a case for a court of equity.

This leaves for consideration in the argument the following items of demurrer, given in substance:

1. That the defendants, Dunlap, Johnson, Leeds, and Walker, did not enter upon the claim prior to October 10, 1893, that is, within three months after the mine was said to have been located under the name of Sampson.

2. That the bill does not disclose that a valid location notice was ever posted upon the surface of the claim or recorded in the recorder's office.

3. That it does not appear from the bill that the locators ever did the work required by law to be done within three months after taking possession or otherwise complied with the law.

4. That the agreement between complainant Johnson and Pilkey, was subject to revocation by either party thereto at any time, and the facts alleged in the bill amounted to an abandonment of said Sampson claim under said agreement.

6. That it does not appear that at the alleged time of entry by Dunlap, Walker, Leeds, and Johnson, the complainant or his co-locators under the Sampson location were in possession of the claim, or any part of it, or had any lawful right to such possession.

ASSIGNMENT OF ERRORS.

1. The Court erred in holding that the facts set out in the bill of complaint would not sufficiently apprise the defendants as to what they were called upon to answer.

2. In holding to the effect that the neglect and failure of Pilkey, in pursuance of the conspiracy set out in the bill of complaint to record the location notice, was not sufficient to warrant a remedy in a proceeding in equity, in the absence of allegations in the bill showing why complainant did not file the notice for record.

3. That the complainant had an adequate and complete remedy at law.

4. That the prayers of the bill, including the prayer for general relief, were not sufficient to warrant the Court in holding the defendants as trustees of premises for the benefit of the complainant.

5. In affirming the decree of dismissal made by the district court.

Argument.

I.

Were the facts set out in the bill sufficient to apprise the defendants what they were called upon to answer?

The bill filed in this case, May 26, 1894, was the first attempt of the complainant to secure his rights in the premises by an appeal to the courts. The details of a conspiracy are not readily ascertained. The contract between Pilkey and his partners was signed May 7, 1893.

By the terms of this contract Pilkey was to discover and *locate* mines for the common benefit of his associates and himself. The *location* involved not only marking the boundaries on the ground and sinking the requisite shaft, but also of posting the notice on the premises and filing a copy of it for record. This was clearly his duty under the contract. Lockhart and Johnson were to furnish him tools, money, etc., but of necessity it was his contract-duty to see to all matters necessary to fix title to his discoveries in the partners. Pilkey discovered and went into possession of the mine July 10, 1893, in pursuance of the contract. Before the 90 days had expired within which the local law required the preliminary work to be done and the location notice to be filed in the recorder's office, the four defendants named, and Pilkey, had entered upon the scheme to defraud the complainant. In pursuance of that scheme Pilkey secretly neglected to finish the

required work, or to record the requisite notice; undertook, by some kind of writing to convey the title to the whole mine to his co-conspirators, reserving for himself a one-fifth interest, which was to be held for him in trust by Walker; the conspirators removed the location notice that had been duly placed on the mine, and covered up or concealed the work which had been already done; and without the knowledge or consent of Pilkey's co-partners, Lockhart and Benj. Johnson, entered upon the occupancy of the premises.

The premises thus occupied by Fagaley, J. A. Johnson, Leeds, and Walker, and afterwards claimed as the "Washington Mine," were identical with the premises located and marked on the ground by Pilkey and named the "Sampson Mine," of this there has been no dispute. The two location notices, the one put up by Pilkey and the one put up by the conspirators, clearly show this identity. The bill and the exhibits accompanying it further show that the complainant secured a copy of the notice which his partner, Pilkey, had posted on the "Sampson" and which had been removed by the conspirators, and filed it and had it duly recorded in the proper office, on December 9, 1893, and that the alleged location notice of the so-called "Washington Mine," or "Sunny South Lode," was not filed for record until December 30, 1893—some twenty days later.

Certainly these facts, standing as proven, show that Fagaley, J. A. Johnson, Leeds and Walker got possession of the mine and kept such possession, denying that complainant had any interest in it, and filed the notice in the recorder's office, renaming the location—all with the intention to defraud, and in fraud of complainant's rights. Here are the allegations and facts constituting the charge and consummation of a fraud. They are admitted as they stand in the bill.

"If there be any one ground upon which a court of equity affords relief with more unvarying uniformity than on any other it is an allegation of fraud, whether proven or admitted."

Atkins *v.* Dick & Co., 14 Pet. 114; L. Ed. 10, 378.

In that case the defendants had demurred to the bill, first, for want of proper parties; second, for want of sufficiently specific facts as to certain details; and third, that the bill contained no matter or grounds on which the Court could grant the relief prayed for.

The Court stated that while the bill was somewhat inartistically drawn, yet the import of the language could be understood, and, based upon such liberal construction of the pleading, found the fraud sufficiently alleged, the relief prayed for (injunction and general relief) sufficient, and directed the court below to overrule the demurrer and order the defendants to answer.

In U. S. *v.* Am. Bell Tel. Co., 128 U. S. 315; L. Ed. 32, 450, this Court held that it is sufficient in stating the facts constituting fraud in a bill in equity, if the main facts or incidents which constitute the fraud be fairly stated so as to put the defendant upon his guard and apprise him of what answer may be required of him.

The rule is also given in Gould's Eq. Pr. Sec 176, to the effect that where the facts constituting the cause of action are supposed to lie in the knowledge of the defendant, but not of the plaintiff, less particularity of statement is required than would otherwise be necessary.

In Enc. Pl. and Pr. Sec. 271, it is laid down that where the facts to be alleged are peculiarly known, or presumed to be known, to the opposite party, less certainty and particularity are required than in ordinary cases. (See also Shipman Eq. Pr. Sec. 231.)

It is difficult to ascertain what counsel and court mean

by declaring that the facts set out in the bill did not sufficiently apprise the defendants what kind of answer they were called upon to make.

II.

Is the complainant entitled to equitable relief in the absence of allegations showing why he himself did not record the location notice within the required ninety days?

The Court says: "The failure to file a location notice for record works a forfeiture of a mining location and leaves the claim open to relocation. There is no allegation in the bill showing that the appellant could not himself have filed this location notice for record within the ninety days. It contains no allegation that appellant relied upon the defendant Pilkey to file it."

Then, continuing, the Court says: "It is true that there is an allegation that the defendants caused and procured the defendant Pilkey to fail and neglect to record it," and further, that in pursuance of a certain agreement set out in the bill, the defendants "procured the defendant Pilkey to withhold said location notice from record." And the Court then declares that these allegations do not excuse the absence of allegations showing why complainant had not himself filed the location notice for record within the 90 days.

We reply to this:

1. That the contract between Pilkey and his partners required him to do everything necessary to fix the title to the claim in the firm. The other members of the firm had the right to rely upon him to do this. He was to *locate* the mines. This included marking the boundaries, sinking the shaft, putting up the discovery notice, and in due time recording it. Pilkey so understood the con-

tract, and so did his co-conspirators. They knew Lockhart and Benj. Johnson were relying on Pilkey to look out for the recording, hence it was agreed that he should not record the notice, and his failure should not be disclosed to his partners. The firm was formed to acquire the title to mines. Two members of the firm were to furnish the tools, money, and so forth, and the third member was to do the rest. He alone could determine the date of discovery. It certainly was his duty, as between himself and his partners, to put up the discovery notice on the premises. He must prepare and post it. He alone, primarily, would know what it contained. It certainly was his duty to make the required copy for filing in the Recorder's office. The recording was as necessary in fixing title in the claimants as posting notice on the mine or sinking the shaft.

2. If, responding to court and counsel, we admit, for the sake of the argument, that either of Pilkey's partners might have properly filed the notice for Record, yet they certainly were under no greater obligation to do so than was Pilkey. Then if the three partners were equally charged with the duty of recording the notice, and one of them determined, without the knowledge of the others, to abstain from the performance of that duty, the hazard of losing title to the claim was greater by at least one-third than it would be if no such determination was reached. Now, the position of the defense is, that although it was the duty of Pilkey to see to the recording, it was also the duty of the complainant. If then the conspirators could induce Pilkey to withhold the notice, and for any reason his partners did not file it, they could safely reap the reward of their wrongdoing.

3. We say that the failure to maintain possession of the claim, and do the development work, were the principal

factors of our safety. Had Pilkey continued the possession for himself and his partners, and finding himself unable to complete the work within 90 days from the date of his discovery notice, he could have made a new location, put up a new notice, and taken time to comply with the statute as to size and depth of shaft. No outside party could have crowded him from the claim. If any questions had arisen they would have been between the locators and the Government.

Section 2324 of the Revised Statutes provides the conditions on which mineral claims can be acquired and held, and adds:

"And upon a failure to comply with these conditions, the claim or mine on which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

4. The defendants having admitted that they induced our partner to abandon the ground, to fail to record the notice, and to finish the work, are not in position to say that all necessary things could not have been done on or before October 10. And here it may be added that if Lockhart or Benj. Johnson had duly filed the notice for record before the 10th of October, yet the conspirators having prevented the completion of the shaft, would thus have defeated our legal title quite as effectually as the Court claims it was defeated by the failure to record.

Neither can it be true, under the admissions, that defendants depended on anything but their own scheme of fraud with Pilkey to get and hold possession of the mine. Having taken advantage of their own fraud they can claim no immunity by alleging negligence on the part of complainant.

III.

The third contention, that the complainant had an adequate and complete remedy at law, has been fully disposed of by the decision in the ejectment case (181 U. S. 516) above mentioned.

IV.

Are the prayers of the bill, including the prayer for general relief, sufficient to warrant the Court in holding the defendants as trustees of the premises for the benefit of the complainant?

The prayers of the bill are:

1. That the defendants be required to answer but not under oath.

2. That a receiver be appointed to take possession of the property, and hold such possession until the further order of the Court.

3. That the contract between Pilkey, Fagaley, Johnson, Walker and Leeds be declared to be void and cancelled and annulled.

4. That the location notice which the last-named defendants filed in the recorder's office be decreed to be void and of no effect as against complainant.

5. That the defendants be enjoined from working the mine or removing the mineral therefrom.

6. That the complainant be decreed to be the equitable owner of the ore and minerals contained therein and entitled to the prior and preferential right to acquire the legal title from the United States.

7. The general prayer for such other and further relief as may be equitable and proper in the premises.

When the bill was drawn this Court had not decided

that the Mexican grant, within whose exterior limits the location was made, did not reserve the land from mineral entry under the ordinary laws of the United States. The decision in the ejectment case, above cited, makes it unnecessary to consider the third and fourth prayers.

But we urge that the remaining prayers furnish sufficient basis to authorize the Court, upon the confessions made by the defendants, to direct that a receiver be appointed, the defendants enjoined from working the mine, and the complainant decreed to be the equitable owner—the defendants holding the legal title for his benefit.

The charge that the defendants secured the legal title by fraud, must be considered as admitted by the demurrer. The sixth prayer is that the complainant be decreed to be the equitable owner. This, coupled with the general prayer, would authorize a decree declaring the defendants as holding the legal title in trust for the equitable owner. It is a rule of equity pleading that if the special prayer does not warrant a decree for the complete relief which the case discloses should be granted, the Court may yet afford a relief under the general prayer agreeable to the case made by the bill. Story Eq. Pl., Sec. 40.

Especially is this true where the required relief is not at variance with the relief sought by the special prayer. This rule covers the conditions disclosed by the sixth prayer and the general prayer in this case. If the court may under the first, hold the equitable title in the complainant, then very properly and logically the general prayer would authorize a decree declaring the defendants trustees, and directing them to make over the legal title to the complainant.

Again the rule seems to be that in cases where the facts established by proofs or admission clearly indicate to the Court the character of the relief that equity should apply,

the Court will grant the relief under a general prayer, although such relief is not specially prayed.

In Stanley *v.* Valentine, 79 Ill. 544, the Court says:

"No rule in chancery is more familiar than that other than the relief prayed for will be granted under the general prayer when consistent with the facts stated in the bill."

This rule was adopted in Hopkins *v.* Snedaker, 71 Ill. 449, where the court declared:

"The point is made that the decree does not conform to the prayer of the bill; but there was a prayer for general relief, and where a bill contains a prayer for general relief, and also a prayer for specific relief, the complainant may have other specific relief provided it be made consistent with the case made by the bill and with the proofs."

The same rule is held in Espinola *v.* Blasco, 15 La. 426, where 7 La. 51, is also cited. See also, Hilleary *v.* Hurdle, 6 Gill, 105; McIntyre *v.* Philadelphia, 24 Penn. 439; Van Voorhis *v.* Bond, 110 Mich. 3; Webster *v.* Harris, 16 Ohio, 490.

Holden *v.* Holden 24, Ill. Appellate, 106.

This was a case involving the title to real estate. The solicitor in his bill prayed for a different relief from that to which he was under all the facts in his case entitled. The court in deciding the case said:

"There was in this bill the prayer for general relief as follows: 'That your orator may have such other relief in the premises as equity may require and the court may deem just.' Under that general prayer the Court could grant the relief appropriate to the facts although the bill was not framed with a view of getting such relief.

"If the facts stated entitled the complainant to certain relief it matters not that such statement of facts may have

been made with the purpose and belief, on the part of the solicitor who drafted the bill, that the relief sought might flow from a different source of equitable jurisdiction." Citing McNeary *v.* Eastland, 10 Urg. 309; Vansant *v.* Allen, 23 Ill. 30.

If the rule found in these various cases is a correct one, the Court in the case at bar has ample authority, so far as the prayers of the bill are concerned, to grant such relief as may be consistent with the case made upon the admitted facts.

We respectfully urge that as the defendants are made up of the conspirators, and those holding under them with notice, that the case should be returned to the lower court with directions to enter a decree declaring the defendants trustees holding the said mining property for the use of the complainant, and directing them to convey the legal title to him.

J. H. McGOWAN,
Attorney for Appellant.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

HENRY LOCKHART,
Appellant,
vs.
H. C. LEEDS, J. A. JOHNSON, JULIA JOHNSON, ET AL.,
Appellees.
No. 121.

STATEMENT AND BRIEF FOR APPELLEES.

There was filed in this cause an original bill of complaint and an amended bill. To both of these, demurrers were sustained. A second amended bill of complaint was then filed, and to this a demurrer was also sustained, and it is from the action of the Court in sustaining the demurrer to this second amended bill of

complaint that the appeal to the Supreme Court of the Territory was taken; and from the decree of the Supreme Court of the Territory affirming the decree of the District Court, this appeal is taken.

All of the record in this cause preceding folio 56, page 33 is immaterial. The second amended bill of complaint begins on page 34. On page 45 in the record appears a motion to dismiss this second amended bill of complaint from the files, because it was not filed within the time allowed by the Court for pleading further upon sustaining the demurrer to the first amended bill of complaint and was filed without leave of the Court. It seems that the court did not pass upon this motion, but allowed the plaintiff to refile his second amended bill of complaint, and ruled the defendants to plead to the same. In answer to this rule, the defendants filed a demurrer, Record page 47. The intervening petition of Joel Parker Whitney and the motion for consolidation of this cause, No. 3888, with two other causes between the same parties, Record pages 49 to 59, are wholly immaterial on this appeal, and uselessly encumber the record. On page 60 appears the final decree sustaining the demurrer and dismissing the case, from which the appeal was taken.

The statement of the material allegations in the complaint and demurrer by the Supreme Court of the Territory is so complete that little can be added to it, and we follow it closely. Record page 64, 10 New Mexico, 568. And whenever we have added to it, we have used brackets. The bill alleges that the plaintiff

and Johnson (then and there) delivered the articles and provisions mentioned in the contract and paid the money and divers other sums of money to and for the said Pilkey. And in all respects kept and performed the said agreement upon their part. (*It no where alleges that any of these articles or any of this money paid was for, or was used in and upon or about the mining claim in dispute in this cause.*) It further al leges that under this agreement, Pilkey located a claim in the name of himself, the appellant, and Johnson, on July 10th, 1893, called it the "Sampson," and that a copy of the location notice is filed as "Exhibit B" to the bill; that he posted that location notice on the said claim marked the boundaries on the ground, transmitted at the request of appellant and Johnson samples of the ore and sunk a shaft or cut on said claim to the depth of ten feet, showing mineral in place within less than ninety days from the time of taking possession of said lode. It further alleges that the discoveries and locators of said claim, not then knowing whether the said mineral was situated upon the public domain of the United States, and so free and open to location under the mining laws of the United States, performed the required acts of location under the said laws and the laws of the Territory and was ready, able and willing in all things to comply therewith, and would have done so except for the fraudulent and unlawful acts of the defendants therein menltioned. The bill alleged the performance of every necessary act to constitute a valid location notice. (The bill also alleges, folio 66.)

"Your orator further states that after the removal by the said defendants of the said location notice posted as aforesaid, by the said Pilkey on the said 'Sampson' mine, a copy thereof was procured by your orator, of which 'Exhibit C' filed herewith is a copy, and the same was recorded in the office of the recorder of said county on December 9th, 1893, etc." There is no allegation to show how the alleged fraudulent acts of the defendants prevented the procuring and recording of the said notice prior to the tenth day of October, A. D. 1893, within ninety days from the date on which it is alleged said claim was located, as required by the Statute of New Mexico. Nor does it allege when and where the plaintiff procured the copy which he caused to be recorded. The only way the plaintiff could have been prevented from procuring a copy would have been for the defendants to have taken possession of the mine before October 10th and thereby removed and withheld from the plaintiff the copy of the location notice posted on the claim; he, the plaintiff, not having previously obtained a copy thereof. *The bill does not allege when possession was taken by the defendant, whether before or after October 10th.* It does allege that on or about October 1st, while in possession of the claim. Pilkey conspiring to defraud and, "on, to-wit, October 1st, 1893, the precise date whereof being unknown to your orator, an agreement was made," the agreement above referred to. An examination of the allegations of the bill would show inferentially that possession was taken by defendants before Octo-

ber 10th. The contract between Pilkey and plaintiff and Johnson did not make it Pilkey's duty to record the notice, unless the words "prospect and locate" imply it. Plaintiff and Johnson had the right to abandon or keep the claims he might locate. He was to send them ore from the claims. There is no allegation that they never requested him to do anything else.)

It further alleges, that on or about October 1st, 1893, the defendant Pilkey, while so in possession of the said lode, ledge, or lead, under and in pursuance of said agreement, wrongfully and fraudulently conspired with the defendants Leeds, J. A. Johnson, Fagaley and Walker, to defraud the appellant and the said Johnson of their interest in and title to the said mines and minerals, discovered and possessed by them as aforesaid, of which the said Pilkey, as the partner and co-owner with your orator, was then in pursuance of said conspiracy and confederation in possession, and on, to-wit, October 1st, 1893, the precise date whereof being unknown to your orator, an agreement was made and entered into by the defendants Fagaley, J. A. Johnson, Walker and Leeds, and the defendant Pilkey, by which it was agreed that the said Pilkey in violation and fraud, of the rights of your orator in and to the said mine of which he was then in possession as aforesaid, by him discovered and held under said agreement should transfer, convey and deliver possession of said mine to the last named defendant without the knowledge or consent of your orator and the said Johnson, and that they should do and perform all other acts

deemed necessary for that purpose. And the bill further states, "That the said complainant (meaning Pilkey) by an instrument in writing, the precise terms of which are unknown to complainant and same being in possession of defendants or some of them, sold, transferred and conveyed to the defendants Fagaley, J. A. Johnson, Leeds and Walker an undivided four-fifths interest in said mine and mineral, the said Pilkey retaining an undivided one-fifth interest therein, which was conveyed to said Walker by said instrument and by him held in secret trust for said Pilkey, and in pursuance of said fraudulent combination and conspiracy, the defendants Frank Fagaley, J. A. Johnson, Lee Walker and H. C. Leeds, together with the defendant J. Q. Wills, caused and procured the defendant Pilkey to stop work upon the said mines under his said agreement and to fail and neglect to record the said location notice so by him posted thereon as aforesaid, and the said defendants, or some of them, wrongfully removed the said location notice from said claim and said defendants covered up or concealed the said workings thereon, theretofore done and performed by the defendant Pilkey, and without the knowledge or consent of your orator and the said Johnson, entered into and upon said lead, lode, ledge and deposit bearing gold and silver, and upon the said parcel or surface ground, including the same mentioned and described in said location notice, and known as the 'Sampson' mine, and denied and still deny that your orator had or has any interest therein, and thereafter, having so

procured possession of the same, the said defendants in pursuance of said confederacy, caused to be posted upon said mine a location notice, and filed the same for record in the recorder's office of said county," etc., a copy of which is filed and a part of the bill, etc., and, "thereby said defendants claimed to have located the said lode for the benefit of themselves as locators * * * under the mining laws of the United States, and called and designated the same as the 'Washington lode.'" The bill then alleges that the said defendants agreed among themselves as to the respective interests each of them should have in said location, and that the said Pilkey should be entitled to a one-fifth interest therein, but that the said last named interest should be claimed and held by said Walker in trust for him.

The bill then alleges that the ground upon which these locations were made is situated within the exterior boundaries of a tract of land claimed to have been granted in 1728, by the then Spanish authorities, to one Antonio Lucero, and that the same was, at the time of the making of said locations, claimed by certain persons under said alleged grant, and that claims were then, and at the time of the filing of said amended bill, pending in the United Staes Court of Private Land Claims, and undetermined; and further alleges that neither the said Antonio Lucero, nor his heirs or successors, had become entitled in law or equity to the minerals contained therein, and that by virtue of the

location of the said "Sampson" claim by the said Pilkey, under the said agreement with the appellant, the appellant became and now is equitably entitled to the minerals contained therein, and had a paramount right and title in and to the same, as against the said defendants of any or either of them. It also alleges that the other defendants named in the bill claim some right or interest in and to said mining claim known as the 'Washington," derived through their co-defendants. It alleges that the mineral deposit so discovered by said Pilkey was not and is not subject to location as a mining claim under and in pursuance of the laws of the United States, because the same is situate within the said alleged private land grant, and that by virtue of the said prior discovery, possession and working of the said mining claim by the said Pilkey under said agreement, the appellant became and was and is equitably entitled to the minerals contained in said location as against the said defendants, or any other persons, except the Government of the United States The bill also alleges that the appellant by virtue of conveyaneces, had acquired an undivided title and interest as tenant in common in said private land claim superior to any title or right thereto on the part of the defendants, or either of them, and is lawfully entitled to enter upon and work the said mine.

The bill also alleges, that after the removal by the said defendants of the said location notice, posted as aforesaid by Pilkey, a copy thereof was procured by the appellant and filed and recorded in the office of

the recorder of the county of Bernalillo in which the same was situate.

The bill further alleges, that the appellant, by virtue of the facts alleged in the said bill, became the equitable owner of the mineral in said claim, and had a preferential right to acquire the legal title to the same from the United States, and that the location thereof under the name of the Washington by the defendants was wholly inoperative and void, and that the said Pilkey, by reason of his participation in the said fraudulent conspiracy and combination by virtue of the said agreement with the appellant and Ben Johnson, had forfeited all right or interest, direct or indirect, in and to the said Sampson mine, and that said defendants claimed that the said Washington location was a valid location and denied the appellant had any interest therein, and excluded him from the possession thereof The bill also alleges the insolvency of some of the defendants, and that the appellant would suffer irreparable injury unless the defendants were enjoined from working the same.

The bill then prays for the appointment of a receiver to take possession of the said Sampson mine, and that the said transfer and conveyance executed by the said Pilkey to said Fagaley, Leeds, J. A. Johnson and Walker be declared fraudulent and void as against him, and that it be cancelled and annulled; and that the location notice of the Washington lode be decreed to be void and of no effect as against the appellant; and that the defendants be enjoined from mining,

working or removing from the said Washington lode any ore; and that he be decreed the equitable owner of the said ore and mineral contained therein; and also for general relief.

To this bill the defendants filed a demurrer, among others, upon the following grounds: That the bill did not allege that the defendants entered upon the mining claim within three months after the said mining claim is alleged to have been located under the name of the "Sampson"; that it appears that no valid location notice was ever posted upon the surface of said claim or recorded in the recorder's office, as required by law; and because the agreement alleged to have been made between plaintiff and Ben Johnson and defendent Pilkey was subject to revocation by either party thereto at any time; and that the facts alleged in the amended bill amounted to an abandonment of said alleged "Sampson" claim under the terms of his alleged agreement and because it did not appear from the allegations in the bill, that at the time of the alleged entry of the defendants on this exact mining claim, the complainant and his co-locators, were in possession of the said mining claim or any part thereof; and because the complainant's remedy was at law, and that the amended bill did not state a case for a court of equity.

The assignments of error by the appellant are, that the court erred in sustaining the demurrer of the defendants to the plaintiff's "second" amended complaint, and ordering the dismissal of the said case.

POINTS AND AUTHORITIES.

I.

We have already shown that the bill does not allege that possession was taken before the ninety days allowed for perfecting a location had elapsed. Inferentially it alleges that possession was taken before. It should have clearly alleged when it was taken "It may be affirmed as an elementary rule of the most extensive influence that the bill should state the right title or claim of the plaintiff with accuracy and clearness, and that it should, in like manner, state the injury or grievance of which he complains, and the relief which he asks of the Court."

Story on Equity Plead., Sec. 241.

"Uncertainty in a bill (as has been well observed) may arise in various ways. (1.) The case intended to be made by the bill may be vague and uncertain (2.) The case intended to be made may be certain, but the allegations of the bill may be so vague and general as to draw with them the consequences and mischiefs of uncertainty in pleadings. (3.) Some of the material facts may be stated with sufficient certainty, and others again with so much indistinctness or incompleteness as to their nature, extent date, or other essential requisites (as, for example, in stating the title of the plaintiff) as to render inert, or inefficient, those with which they are connected,

or upon which they depend. In each of these cases the defect may be fatal to the objects of the bill."

Id. 242.

We respectfully submit that this bill was filed upon a theory of the law of mining claims within unconfirmed grants, which this Court has held unsound, and the allegations have never been amended, as will be shown by a comparison with the original bill. The failure to allege when possession was taken is vital. It is upon the theory that it was taken after October 10th, that appellant attempts to build up his case. There is no allegaion in the bill to support it. The pleading, if ambiguous, is taken most strongly against the pleader. The allegations of fraud, or how plaintiff was injured by Pilkey's failure to record the location notice, or why he did not record it himself prior to October 10th, since he did record in December, are equally fatal. Out of the many instances of fatal defects for uncertainty cited by Story, in the sections following those we have quoted from, we quote the following:

"So, where a bill was founded upon the supposed due execution of a power, and insisted, in the alternative, that it was a good execution of the power at law, or if not, that it was a good execution of the power in equity; the bill was held bad on demurrer; for the plaintiffs ought to state distinctly whether their case is at law or in equity; for if it be good at law there may be no remedy in equity."

Story on Equity Plead., Sec. 246.

The facts which determine whether the remedy is at law or equity are not distinctly alleged.

"A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of a purpose to the parties when not justified by the language used."

Dillon vs. Barnard, 21 Wallace, 437.

The recovery must be had on the case made by the pleadings or not at all.

Grosholz vs. Newman, 21 Wall., 488.

Further, on the question of certainty of allegation when possession was taken, and of fraudluent withholding of the location record, we quote: "There must be a sufficient equity apparent on the face of the bill to warrant the relief prayed for, and the material facts on which the plaintiff relies must be so distinctly alleged as to put them in issue."

Harding vs. Handy, 11 Wheat., 103.

See also,

Harrison vs. Nixon, 9 Peters, 483.

"No decree can be founded on matters not in issue between the parties. If the bill sets up a case of fraud, the complainant is not entitled to relief by establishing some one or more of the facts independent of fraud, although the facts might create a case un-

der a wholly distinct head in equity."

Bradley vs. Converse, 4 Cliff, 366.

"The rule is familiar that the Court will refuse to decree unless the substantial ground work of the case on which relief is sought is *distinctly* alleged in the bill."

The case holds that the objection is by demurrer

Pelham vs. Edelmeyer, 15 Fed., 262.

See also,

Foster vs. Goddard, 1 Black., 506.

Socola vs. Grant, 15 Fed. Rep., 487.

Eyre vs. Potter, 15 How., 42.

Kohler vs. Hubbey, 2 Black, 715.

"It is not permissible for a complainant to unite in his bill two inconsistent causes for equitable relief An action to set aside a transfer as fraudulent, in which the Court is asked to adjudge the defendant's title to the vessel void, and one where the transfer is alleged to be valid and the complainant claims relief on the theory of a subsisting joint interest with the defendant by reason of the transfer, proceed on entirely different grounds, and are utterly repugnant to each other. Both theories cannot be true on any hypothesis of fact, or by any fiction of law."

Wilkinson vs. Dobbie, 12 Blatch., 298; 29 Fed. Cases, No. 17,670.

This is exactly in point. Plaintiff has proceeded upon the theory that the locations were both made when no legal locations could be made, that plaintiff's possession was intruded upon by collusion, and

agreement prior to the 10th of October, 1893, and that his rights being equitable he had a right to maintain this suit. The Court held that on this state of facts, if true, his prior possession would sustain an action at law. That the relief he asked was not equitable. The specific relief he asked was that the Washington location be declared void and for possession. Now he maintains that the location of the Washington be held void, and that the holders of the title be held as constructive trustees under the prayer for general relief. We respectfully submit that the allegations in the bill for this purpose are absolutely uncertain and do not warrant any such relief. That under the authorities quoted in appellants' brief the Washington location must be held valid, and that he has not even attempted to state or stated a case, which would entitle him to reach the alleged interest of Pilkey in the Washington. As to what particularity is necessary in allegations of fraud, see

U. S. vs. Atherton, 102 U. S., 372.
Ambler vs. Choteau, 107 U. S., 589.
Voorhees vs. Bowstick and wife, 16 Wall. 16.

"Whether the fraud be alleged in the declaration complaint or bill, or set up by way of defense in the plea, answer or replication, it is essential that the facts and circumstances, which constitute it, should be set out clearly, concisely and with sufficient particularity to apprise the opposite party of what he is called upon to answer."

9 Ency. of Plead. & Prac., 687, and many authorities cited.

"Charging, generally, that what was done was 'colorable,' a 'fraud,' a 'breach of trust' and a 'scheme, these are allegations of legal conclusion merely which a demurrer does not admit."

Fogg vs. Blair, 139 U. S., 127.

See also,

St. Louis Ry. Co. vs. Johnston, 127 U. S. 577.

"Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient ground of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud, or a breach of trust, for which a Court of Chancery can give relief."

Van Weel vs. Winston, 115 U. S., 237.

See also,

Brooks vs. O'Hara, 7 Fed. Rep., 532.

Phelps vs. Elliot, 35 Fed. Rep., 455.

"Manifestly, in equity pleadings, general accusations of fraud and collusion are ineffective. 1 Daniell, Ch. Pr. (5th Ed.) 324, and notes; Riley vs Lyons, 11 Heisk, 251; Whitthorne vs. St. Louis M I. Co., 3 Tenn. Ch., 147. The pleader should state the facts and not formulate mere epithetic 'charges.' And it has been recently decided that the same rule applies at law. Hazard vs. Griswold, 21 Fed. Rep. 178. If the facts are not t obe ascertained by dili-

gence, because of some obstruction, or if the evidence of them is in possession of the other side, this should be made to appear, with technical averments showing the necessity for discovery, where that is wanted; but a Court cannot sutain a bill upon mere denunciatory statements of the plaintiff's suspicions or belief. The best pleadings are those which state the inculpatory facts that carry with them their own conviction of the fraud, and by which the wrongdoing appears, without much necessity for characterizing it as such."

Lafayette Co. vs. Neely, 21 Fed. Rep., 744

The only allegation of fact in the bill, is that Pilkey gave up an undivided third interest standing in his own name in the "Sampson" and accepted an undivided fifth in the "Washington," as an inducement to withhold from record the "Sampson" location, and to surrender possession to the locators of the "Washington," but when this was done is left without allegation, inferentially before the 10th of October. We submit that there are n oallegations in the bill justifying the Court in granting the relief specifically prayed for in the bill, and that the demurrer was properly sustained.

The first ground of demurrer quoted in appellant's brief, is based upon the proposition that the land was subject to entry under the mining laws, and if the Washington location was made after the ninety days had elapsed, it was a valid location and could not be declared void as prayed for in the bill, and

this is true. If possession was taken before the niety days had elapsed, that possession was unlawful, and the remedy is in law. We will further consider these propositions hereafter.

II.

The plaintiff is now contending that the defendants can be held as constructive trustees. The bill was filed for no such purposes, and there are no allegations in the bill on which such relief can be predicated under the authorities already cited.

UNDER THE PRAYER FOR GENERAL RELIEF, ONLY SUCH RELIEF AS IS AGREEABLE TO THE CASE MADE BY THE BIL' CAN BE GRANTED.

English vs. Foxall, 2 Peters, 612.

Hobson vs. McArthur's Heirs, 16 Peters 182.

Boon vs. Chiles, 10 Peters, 177.

"Now, it is perfectly clear, according to the practice of the Court, where a specific relief is prayed for even though there be a prayer for general relief, the Court cannot grant a relief which is inconsistent with or entirely different from that which is asked for."

Wilson vs. Graham, 4 Wash. C. C., 53; 30 Fed. Cases, No. 17,804.

"It is true that there was a prayer for general relief, but relief given under the general prayer must be agreeable to the case made by the bill."

Allen vs. Pullman Palace Car Co., 139 U. S 6662.

Hayward vs. National Bank, and authorities cited, 96 U. S., 614.

Georgia vs. Stanton, 6 Wall., 77.

"In order to entitle a plaintiff to a decree under the general prayer, different from that specifically prayed, the allegations relied upon must not only be such as afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed, otherwise the Court would take the defendant by surprise, which is contrary to its principles."

I Daniels Ch. Pr., 386. Quoted and applied in Curry vs. Lloyd, 22 Fed. Rep., 264, which see specially.

"But, even when a prayer of general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the Court will grant such relief only as the case stated will justify; and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby."

Story Eq. Plead., Sec. 42.

See also,

3 Ency. of Pl. & Pr., 350, et seq., and notes

In view of these authorities the conclusion seems inevitable that the frame and structure of this bill was not intended to secure the holding of anybody

as constructive trustee under the "Washington" location. It did seek to forfeit Pilkey's interest in the "Sampson." The relief now sought is wholly inconsistent and in conflict with that for which the bill was framed and the prayers for the specific relief.

This Court in the opinion rendered in favor of the defendants in the ejectment case, made a reservation as to any equitable right the plaintiff might show, to hold the defendants as constructive trustees on the ground of fraud, but this suit when that decision was rendered, had already been tried. This bill was not filed for any such purpose and it never occurred to plaintiff's counsel to make any such contention until after it was clearly shown by the decision of the Supreme Court of New Mexico that mineral land on this grant was subject to location and entry in 1893, and the final settlement by this Court on appeal from the Court of Private Land Claims of the boundaries of the grant to Lucero, eliminating the land embraced in these and many other mining claims from the grant. We cite the decision to which we refer, as follows:

Lockhart vs. Wills, et al, 9 N. M., 344.
Whitney vs. United States, 167 U. S., 529.
Lockhart vs. Johnson, et al, 181 U. S., 516.

III.

We will now consider the special prayers: First, that the said instrument of writing and conveyance executed by the said Pilkey to his co-defendants be declared fraudulent and void as against plaintiff, and

that it be cancelled and annulled. As we have shown, this imaginary instrument was, as alleged, executed on or about October first, and provided that Pilkey should secretly "transfer, convey and deliver possession of said mine, 'The Sampson,' and sold, transferred and conveyed to the defendants Fagaly, J. A Johnson, Leeds and Walker an undivided four-fifths interest therein." These allegations relate to the "Sampson," not the "Washington," as an inspection of the bill clearly shows. This contract was not recorded. No authority can be found for the cancellation or annulling of such an instrument. Pilkey had a right to convey a one-third interest in the "Sampson"—there was nothing in his contract prohibiting it —a conveyance of any greater interest under the allegations of the bill, while the "Sampson" location was in force, was simply void. It did not constitute a cloud on the title of his co-tenants.

Hartford, &c. Ore Co. vs. Miller, 3 Mor. Min. Rep., 353. 41 Conn., 112.

"The rule applicable to this class of cases is that equity will interpose only when the pretended title which it is alleged constitutes a cloud, or the proceeding which it is apprehended will create one, is apparently valid on its face."

6 Am. & Eng. Enc. of Law (2 Ed.) 153.

In Whitehead vs. Shattuck, 138 U. S., 146, it is said:

"The facts set forth in the bill of the plaintiff clearly shows that he has a plain, adequate and complete

remedy at law for the injuries of which he complains He aleges that he is the owner in fee, as trustee, of certain described lands in Iowa, and his injuries consist in this: That the defendants are in the possession and enjoyment of the property, claiming title under certain documents purporting to transfer the same, which are fraudulent and void. If he is the owner in fee of the premises, he can establish that fact in an action at law; and if the evidences of the defendants' asserted title are fraudulent and void, that fact he can also show. There is no occasion for resort to a Court of Equity, either to establish his right to the land or to put him in possession thereof."

Whitehead vs. Shattuck, 138 U. S., 150.

Appellant contended in the Court below that he had a right to this relief under Section 4010 of the Compiled Laws of New Mexico (1897), which authorizes the bringing of a suit to quiet title by one out of possession, as well as by one in possession. We respectfully submit that the Legislature had no power to authorize one out of possession to bring such a suit. Under such a statute, passed by a State this suit could not be maintained.

"It is probable that the only effect of this statute was to enable owners of land not in possession to file a bill for the removal of clouds upon their title; since the ordinary jurisdiction of a Court of Chancery is sufficient toenable owners in possession to file such a bill. The questions, what constitutes such a cloud upon the title, and what character of title the com-

plainant himself must have, in order to authorize a Court of Equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in these Courts. Prominent amongst these are, first, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarass the real owner in controverting it. For it is held that, where the complainant himself has no title, or a doubtful title, he cannot have this relief. 'Those only,' said Mr. Justice Grier, 'who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a Court of Equity to give them peace or dissipate a cloud on the title.' Orton vs. Smith, 18 How., 263; and see Ward vs. Chamberlain, 2 Black, 430, 444; West vs. Schnebly, 54 Ill., 523; Huntington vs. Allen, 44 Miss., 654; Stark vs. Starrs, 6 Wall., 402. And as to the defendant's title if its validity is merely doubtful, it is more than a cloud, and he is *entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to law.* Overing vs. Foote, 43 N. Y., 290; Meloy vs. Dougherty, 16 Wis., 269. Justice Story says: 'Where the illegality of the agreement, deed or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the in-

terference of Courts of Equity, to direct it to be cancelled or delivered up, would not seem t oapply; for in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defense; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury.' 2 Eq. Jur., Sec. 700a."

Phelps vs. Harris, 101 U. S., 374-5.

To the same effect is Frost vs. Spitley, 121 U. S. 557, where all the decisions of the Supreme Court are quoted and reviewed. Reviewing a case under the Nebraska statute, it says:

"By reason of that statute, a bill in equity to quiet title may be maintained in the Circuit Court of the United States for the District of Nebraska by a person not in possession, if the controversy is one in which a Court of Equity alone can afford the relief prayed for. Holland vs. Challen, 110 U. S., 15, 25. The requisite of the plaintiffs possession is thus dispensed with, but not the other rules which govern the jurisdiction of Courts of Equity over such bills. Under that statute, as under the general jurisdiction in equity, it is 'the title,' that is to say, the legal title, to real estate, that is to be quieted against claims of adverse estates or interests. In State vs. Sioux City & Pacific Railroad, the Supreme Court of Nebraska said: 'Whatever the rule may be as to a party in actual possession, it is clear that a party not

in possession must possess the legal title, in order to maintain the action.' 7 Nebraska, 357, 376. And in Holland vs. Challen, above cited, this Court said: 'Undoubtedly as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises.' "

Frost vs. Spitely, 121 U. S., 557.

The allegation that plaintiff was a co-tenant in the Cochiti grant was wholly immaterial. As already shown by the final decision of this Court, affirming the decree of the Court of Private Land Claims, that part of the Cochiti grant on which the claim in controversy in this case is located was rejected and the land held to be public lands of the United States.

Whitney vs. United States, 167, U. S., 529.

Then, too, in the ejectment suit about this claim, this Court has held land within this grant, while the grant was under investigation before the Court of Private Land Claims and on appeal, to be subject to entry under mining laws of the United States.

Lockhart vs. Johnson, et al, 181 U. S., 516.

Previously this Court had already held that under the Act of 1854, "The Surveyor General's report is no evidence of title or right to the possession."

Pinkerton vs. Ledoux, 129 U. S., 351.

Lockhart vs. Wills, 9 N. M., 344.

Lockhart vs. Johnson, 181 U. S., 516.

Astrozaron vs. Santa Rita Min. Co., 148 U. S., 80.

The last case holds claim of interest in an uncon-

firmed grant cannot be made the basis of a suit to quiet title.

If it is contended that this was a conveyance of an interest in the "Washington," the position is untenable. It is contrary to the allegations of the bill. Pilkey, as the bill alleges, had no interest in the "Washington" standing in his name to convey. The allegation is "by which it was agreed that the said Pilkey in fraud of the rights of your orator in and to the said mine of which he was then in possession as aforesaid, by him discovered and held under said agreement, should transfer, convey and deliver possession of said mine, etc." This is alleged to have been done "on, to-wit October 1st, 1893, the precise date whereof being unknown to your orator." Folio 61. These alegations cannot apply to the "Washington." Under allegations of the bill all that remained to be done to make the "Sampson" location complete was to record the "Sampson" notice of location and ten days of the ninety, within which that could be done under the New Mexico statute, remained. No conveyance by Pilkey of an interest in the "Washington," even if there had been any such interest of record in his name could have operated as a cloud upon plaintiff's title to the "Sampson," for the reason that it did not fall in plaintiff's alleged chain of title to the "Sampson."

Van Wyck vs. Knevals, 106 U. S., 378.
Pixley vs. Huggins, 15 Cal. 128.

6 Am. & Eng. Ency. of Law (2nd Ed.), 166
Notes 5 and 6.

IV.

The Legislature had no power to dispense with possession as a prerequisite to maintain such suits. The constitution of the United States guaranteed the right of trial by jury in such cases, as under the common law, as enforced at the time of the adoption of the constitution, the parties had a right to such trial. We quote further from Whitehead vs. Shattuck, 138 U. S., 151:

"The sixteenth section of the Judiciary Act of 1789, 1 Stat., 82, C. 20, declared 'that suits in equity shall not be sustained in either of the Courts of the United States, in any case where plain, adequate and complete remedy may be had at law,' and this provision has been carried into the Revised Statutes, in section 723. The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since their adoption in the courts of England. The term 'speedy' as used in the demurrer is embraced in the term 'complete' in the statute.

"The Seventh amendment of the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' That provision would be defeated if an ac-

tion at law could be tried by a Court of Equity, as in the latter court a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment. Lewis vs. Cocks, 23 Wall., 466, 470; Killian vs. Ebbinghaus, 110 U. S., 568, 573; Buzard vs. Houston, 119 U. S., 347, 351. And so it has been held by this Court 'that whenever a Court of Law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain adequate and complete remedy, without the aid of a Court of Equity, the plaintiff must proceed at law because the defendant has a constitutional right to a trial by jury.' Hipp vs. Babin, 19 How., 271, 278.

"It would be difficult and perhaps impossible to state any general rule which would determine in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

Whitehead vs. Shattuck, 138 U. S., 150-151.

"The case then goes on to review the case of Holland vs. Challen, 110 U. S., 15, and other cases, and shows that the Court only held that under the statutes dispensing with possession in the plaintiff, the Court could take jurisdiction where neither party is in possession. It quotes from Holland vs. Challender, 'should suit be brought in the Federal Court under the Nebraska statute, against a party in possession there would be force in the objection that a legal controversy was withdrawn from a Court of Law, but that is not this case, nor is it of such cases we are speaking.' It is thus seen that the very case that is no wbefore us is excepted from the operation of the ruling in Holland vs. Challen, or at least was designedly left open for consideration whenever similar relief was sought, where the defendant was in possession of the property."

Whitehead vs. Shattuck, 138 U. S., 156.

The constitution is absolutely binding upon the Territories by statute. We respectfully submit that Ely vs. N. M. & A. R. R. Co., 129 U. S., 291, is not in conflict with this contention. If it was it was an earlier case than Whitehead vs. Shatuck.

V.

The authorities we have quoted under the last two headings fully dispose of the special prayers in the bill that the 'Washington" location be declared void

and that plaintiff be declared the equitable owner of the ore and mineral in said lode.

The prayer that the defendants be enjoined from working the lode, and the plaintiff be declared the equitable owner, is nothing but a prayer to eject defendants and give the claim to the plaintiff.

"To give a Court of Equity jurisdiction, the nature of the relief asked must be equitable, even when the siut is based on an equitable title. The plaintiff does not allege that the defendants, who are in possession of the premises, have the legal title, or that they obtained possession under any person who had it. Nor does she state any facts which connect them with her equity. They being mere naked trespassers, in possession, she prays that they may be turned out of, and she, who has only an equitable title, may be put in possession. The relief prayed for is such as a Court of Law is competent to grant, if the plaintiff's title would justify it. But the plaintiff does not seek by her bill to better her title. If all the relief asked for were granted, she would still have an equitable title only. The case is, therefore, an ejectment bill brought on an equitable title. In these respects it is similar to the bill in the case of Galt vs. Galloway, 4 Pet., 332." * * * *

"This decision is in point, and shows the bill to be without equity as to those of the defendants who are in possession. Their possession is good against all the world except the true owner. As the bill asserts no equity against them, they have the right to stand on

their possession until compelled to yield to the true title, and to demand a trial by jury of the question whether the plaintiff has the true title. The plaintiff cannot deprive them of the right by neglecting to acquire the legal title, and upon the ground of her equitable title ask the aid of a Court of Equity. She can turn the defendants out of possession only upon the strength of the legal title, which she must first acquire Having done this, a Court of Law is the proper forum in which to bring her suit. Hipp vs. Babin, 19 How. 271; Parker vs. Winnipiseogee Manufacturing Co., 2 Black, 545; Grand Chute vs. Winegar, 15 Wall., 373; Lewis vs. Cocks, 23 Wall., 466; Killian vs. Ebbinghaus, 110 U. S., 568."

Fussell vs. Gregg, 113 U. S., 554-555.

See also the cases last cited above.

Hipp vs. Babin, 19 How., 271.

Parker vs. Man'f'g Co., 2 Black, 545.

Grand Chute vs. Winegar, 15 Wall., 373.

Lewis vs. Cocks, 23 Wall., 466.

Killian vs. Ebbinghaus, 110 U. S., 568.

VI.

Prior possession by Pilkey, and surrender of that possession, as alleged in the bill, would, if proven, make a case for recovery in a suit at law. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from mere trespassers who entered without any title.

Christy vs. Scott, 14 How., 180.

"This principle is so well settled, in the law of ejectment and quare clausem fregit, as to need no citation of authorities. It will be found laid down by Mr. Greenleaf in 2 Green. Ev., Sec. 311, that either actual possession of the premises, or receipt of rent is prima facie evidence of title in fee. See also Secs. 618, 618 (a)."

Burt vs. Punjaub, 99 U. S., 180.

In the same volume the Court repeats the statement just quoted, and adds:

"If this be the law, when the right of recovery depends on the strict legal title in the plaintiff, how much more appropriate is it as evidence of the superior right of possession, under the Acts of Congress which respect such possession among miners."

Campbell vs. Rankin, 99 U. S., 262.

VII.

Pilkey and plaintiff, under the allegations of the bill were tenants in common, and Pilkey's possession was plaintiff's, until he was ousted. If Pilkey sold his interest in the "Sampson location' to his co-defendats they became co-tenants with the plaintiff, and if they were in possession, that possession was plaintiff's, too until they openly repudiated it, and commenced to hold adversely. This is also true as to Pilkey. Upon proof of the Sampson location, and the sale of an interest in it by Pilkey, and the entrance of the defendants into possession and the exclusion of the plaintiffs, a *prima facie* case would have been made out in favor of the

plaintiff. This Court, in such a case, says:

"Claiming, as both parties did, under Payne and Cook, the regularity of the location of the mining claims are not in question, and when in 1862 the plaintiff purchased from one of the owners of the claim an undivided interest therein, and went into possession with his grantors and with others deriving title from the original locators * * * * he became a tenant in common with those who were then the owners. He was such when the Union Gold and Silver Mining Company purchased the interest of other owners. By that purchase, that Company succeeded to a tenancy in common with him and so did the defendant, when it became the purchaser. * * The possession of his co-tenants was his possession. They held it for him until he was ousted. That this is a settled rule of law is not denied."

Mining Co. vs. Taylor, 100 U. S., 40.

It is immaterial that Pilkey conveyed more interest than he had. The deed was effectual to convey his third. The same principles are laid down in Freeman on Cotenancy and Partition, Sections 166 and 167.

"The action of ejectment is an appropriate remedy whenever either of the co-tenants has been ousted by the other from the lands of the cotenancy, or any part thereof."

Freeman on Contem. and Part., Sec. 290.

There is no act done by Pilkey upon which to predicate plaintiff's right, alleged in the bill, except the surrender of the possession to his co-defendants, and, as

we have shown, it does not appear whether this was done before October 10th or afterwards. It matters not when it was done, if it was a surrender of possession by Pilkey' plaintiff's possession was good up to that time. If before, then the defendants intruded upon plaintiff's property and held it adversely, plaintiff was excused from completing the location as against the defendants, in a suit at law as well as in equity. Such intrusion, whether with the consent of Pilkey or without it, was wrongful. In such a case this Court has said in a suit at law:

"They would not be deprived of the inchoate rights by the tortious acts of others; nor could the intruders and trespassers initiate any rights which would defeat those of the prior discoverers."

Erhardt vs. Boaro, 113 U. S., 534.

"A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator but all the world, because the law allows no such thing to be done."

Belk vs. Meagher, 104 U. S., 284.

"The record shows actual possession in the appellees which is prima facie evidence of title, and as we said in Lebanon M. Co. vs. Con. Rep. M. Co., 6 Colo., 380, 'entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession, amounts only to

a trespass, and cannot form the basis for the acquisition of a title.' "

Weise vs. Barker, 7 Colo., 178; 2 Pac., 921
Morton vs. Solambo, 26 Cal., 597.

VIII.

If defendants did not enter into possession until after the 10th of October, and Pilkey was still in actual possession, the entry was nevertheless tortious, and the foregoing authorities would apply. If a peceable entry was made, on the ground of its being unoccupied vacant ground, by reason of the fact that the location made by Pilkey on July 10th had not been perfected by filing the location notice, then the ground was subject to location, and the Washington location was valid. This would be true, for whatever reason the failure to file the Sampson notice may be attributable. It is upon this assumption that the appellant no wclaims that the defendants should be held as constructive trustees. We have already shown, we think, that the bill will not justify such relief. We will, however, proceed to discuss the law applicable to such conditions. The "Sampson" location must for that purpose be considered at an end. There is no relation of confidence between Pilkey's co-defendants and plaintiff. It is only Pilkey's alleged interest in the Washington that can be reached under the contract between him, Johnson and the plaintiff. The bill, we have shown, is not framed for that purpose, and we submit that the plaintiff does not show himself entitled to this relief.

IX.

A Court of Equity will not specifically enforce this contract, as it lacks mutuality. Pilkey could not have enforced it against the plaintiff and Johnson; Pilkey could have abandoned this contract whenever he saw fit, unless actually performed by the plaintiff. There is no allegation that the plaintiff and Johnson ever expended a cent, or did anything under this contract with reference to the "Sampson" location, except to file the location notice on December 9th, and as to this, there is no allegation in the bill that plaintiff did not know that the location notice had not been filed prior to October 10th, and accounting for why he did not file it sooner. The bill alleges: "After the removal by said defendants of the said location notice, posted as aforesaid by said Pilkey, of the 'Sampson' mine, a copy thereof was procured by your orator * * * and the same was recorded," etc., (Transcript, folio 66). It will be observed that the sum of thirty dollars, and a few articles not worth ten dollars, was all that Pilkey was to receive under this contract. The articles he was to receive, at once, and "the thirty dollars, less any montys or provisions or other articles except as above enumerated," he was to receive when he should (have) sunk or driven *a shaft or tunnel four feet by six in a vein of mineral bearing quartz to a depth of twenty feet from the lowest level of the surface at its mouth, such vein and locality to be designated by said second parties.*" This expenditure is all to be made on one vein, in one shaft or tunnel, the vein to be designated

by plaintiff and Johnson. The bill alleges that all that was to be done by them was done "then and there," when the contract was signed. Did they designate the "Sampson" as such vein? The bill noes not say so Was this expenditure made on that ground? The bill does not say so. If it was all expended on one claim, where is the consideration for the performance by Pilkey of the contract for the rest of the year it had to run? It was to run a year, but that was at the option of plaintiff and Johnson. "It shall be at the option of the said second parties to continue working, or abandon any claim located at any time they deem proper." Did they exercise that option as to the "Sampson?" What did Pilkey get if they chose to abandon every claim he discovered? How could he compel them to comply with this contract? In fact what were they to do after furnishing the thirty dollars and these articles? Nothing. Equity will not specifically enforce any such contract, or declare any trust arising out of it, when the bill does not allege that a single cent of the expenditure was made on the ground in controversy.

A mining contract somewhat similar was passed on in Geiger vs. Green, 4 Gill., 472; 13 Morrison's Min. Rep.; where it is said:

"A contract so unequal in its stipulations and bearing, which binds one party, while it leaves the other unfettered, as it respects the observance of its terms, in which there are to be seen no mutual or reciprocal engagements, and which must be regarded, therefore, as unreasonable and inequitable, can never be enforced

by a Court of Equity."

Geiger vs. Green, 4 Gill., 472; 13 Mor. Min. Rep., 329; quoting, Seymour vs. Delancy, 6 Johns. Ch., 224.

Radcliff vs. Worrington, 12 Vesy., 331.

German vs. Machin, 6 Paige, 292.

Boucher vs. Vanbuskirk, 2 A. K. Marshal, 346.

Moore vs. FitzRandolph, 6 Leigh., 185, also quoting from Lord Redesdale.

"I have no conception that a Court of Equity ought to decree a specific performance in a case, except where both parties had, by the agreement, a right to compel a specific performance, according to the advantage which they might be supposed to have derived from it; because, otherwise, it would follow that the Court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him, he would be liable to the performance, and yet if advantageous to him, he could not compel a performance." 'This,' he says, 'is not equity.'"

13 Mor. Min'g Rep., 328-9; 4 Gill., 472 (Md.)

In a Michigan case Judges Cooley and Campbell decide that if no basis appears upon which one who has taken a mining lease can charge others with its obligations, the latter cannot charge him with having taken it in the common interest, and claim rights under it.

Pierce vs. Pierce, 55 Mich., 675; 13 Mor

Min. Rep., 675.

See also Ducie vs. Ford, 138 U. S., 588, especially applicable to the uncertainty of the allegations in the bill.

Nothing can be more in point. The relief, whatever it may be called, so far as Pelkey is concerned, is the specific enforcement of the contract, and depends upon the enforcement of the contract to prospect for plaintiff and Johnson for a year, and that he, Pilkey, should forfeit any interest by reason of concealment of a discovery or failure to locate, which he might acquire directly or indirectly. This must relate to Pilkey's alleged interest in the Washington. Plaintiff and Johnson, under this contract, have the option to assume obligations and rights under the locations or abandon them. There is no mutuality about this.

We again call attention to the fact that the bill contains neither allegations nor prayer upon which any constructive trust, based on the rights asserted by plaintiff under the contract even as against Pilkey's alleged interest in the "Washington," can be predicated.

X.

The contract Pilkey had a right to abandon, and there would be no remedy in equity on it, as already shown, for specific performance. Plaintiff's rights in the Washington location, if he had any, must arise out of the contract. In Johnson vs. Robinsan, 16 Fed. Rep., 903, will be found a decision very instructive on this proposition. We quote the syllabus:

"The partnership relation or association between parties who may be engaged in prosecuting exploration on public lands for mines, must exist at the time of the alleged discovery and location, in order to give to the parties associated an interest in the property. If it does not then exist, so that the person acting in the field, making the discovery and location, can be said to be acting for the others as well as for himself, no interest can be acquired by those who are not personally present.

"Where several persons associate themselves together, by agreement, to go out and discover mines, and some of them furnish the means of prosecuting the enterprise, as provisions and tools and the like, and others go out and contribute their labor, and each party performs his part of the agreement according to its terms, the contract and declaration of the parties show that hey are acting in fulfillment of thetir contract; but when this contract is apparently abandoned, and some new arrangement is made between new parties, and means are furnished by some of them, as arranged in the first instance, and others go out in the prosecution of the joint enterprise, it would be plain that they were acting under and in pursuance of the last agreement, and not the first, and the parties to the first agreement would acquire no interest in the mines discovered."

Johnstone vs. Robinson, et als., 16 Fed. Rep., 903.

This is this case exactly. If Pilkey abandoned the location and permitted others to locate the ground,

whether he took an interest with them or not, the plaintiff acquired no interest, and as this case holds, his remedy is for breach of contract, if any, at law.

"If one who is clearly an agent of another to purchase property, repudiated the agency and acted for himself, using his own funds, he can not be declared a trustee for principal. *Burden v. Sheridan*, 36 Iowa, 125. A different rule seems to be laid down in Story's Equity Jur. Sec. 1211A, but its limitations will be found in another section of the same volume. Sec. 1201A."

First Nat. Bank vs. Bissell, et al., 4 Fed. Rep., 698.

This case also holds that,

"An agreement between two or more persons to negotiate for the purchase of specific property, does not vest any right in either unless such agreement is consummated by a purchase of the property."

Syllabus, 4 Fed. Rep., 699.

This case was affirmed by this court under the title of Bissell v. Penn, et al., 114 U. S., 250, where the difference between *ordinary* partners, contractors and mining partners is explained.

A mere consignment does not establish a partnership so as to establish a relation of trust and confidence.

Tuck vs. Downing, 76 Ill., 71; 7 Mor. Min. Rep., 83.

We admit that while this contract calls the parties partners, still they were nothing but contractors after any lessee was made to their names, as to that loca-

tion, and we further submit that there was no concealment of a discovery, and no allegation of "any failure to locate" "for the purpose of evading the terms of this agreement and defrauding the said second parties," as provided by the contract, alleged in the bill, with such certainty as to entitle the plaintiff to any relief he is seeking.

X.

It is not true that the location of the Washington was the acquirement of an outstanding title as to the Sampson. The Sampson locaion was at an end, or no valid location of the Washington could be made. The authorities relied upon by appellant in the Court below in his briefs do not sustain his proposition. We will consider them, leaving Lindley on Mines and Turner vs. Sawyer, 150 U. S. 578, for separate discussion

Largey v. Bartlett, 44 Pac. 962 (Montana) is a clear case of agency and notheing more. Geo. F. Bartlett agreed upon performance of certain conditions on the part of Largey, to deed to him an undivided half interest in and to the claims in controversy. Largey alleged full performance. J. H. Bartlett, the second defendant, was employed by his brother, George, and Largey, the plaintiff, in making a survey of the claims preparatory to making application for patent, and while so employed posted an amended notice of location in the name of George, and afterwards, between the time of posting and recording, returned and changed the name, inserting that of his wife, and the notice

was so recorded. The Court places its descision squarely up on the ground that there was a subsisting relation of principal and agent existing, and that all the defendants were parties to the fraud perpetrated upon Largey. This is a proposition we have never disputed.

In Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. 413. the Court finds as a fact, that the defendant was an agent for the principal, who was in a distant state, and as such, in possession of the mine, and that while so in possession he could not make a relocation in his own name for failure to do the annual labor, which he himself had agreed to do.

Utah M. Co. v. Deckert, 6 Utah, 183; 21 Pac. 1002, was an action of ejectment. The findings of the court were that for five years the annual work was done on the claim by one Deckert, as stockholder and agent of the plaintiff, who received pay therefor, and refused to act further for plaintiff and took hostile possession of the claim, and for three years did the work in his own behalf, and afterwards quit-claimed to defendant company. Subsequently in 188[illegible], a new location was made for the benefit of the defen[illegible]nt. It appears from the opinion that Deckert was also a director in plaintiff, and as such made the location in the first instance for plaintiff, and had charge of its affairs in Utah, the headquarters of the Company being in Cleveland. The Court decides that Deckert entered into adverse possession wrongfully, against his principal, and that while such wrongful possession was held, plaintiff was excused from doing the annual work. This case is

authority for the defendants that the remedy is at law We do not see how it helps appellant's case any.

The other authorities simply amount to general propositions of law, as to trust relations, as to which we do not dissent, but which we think are inapplicable here. We will not stop to review them.

XIII.

It is not true, as already stated, that a cotenant in a mining claim cannot relocate the claim, if subject to relocation for failure to do the annual labor, nor is it true, that he cannot locate the ground where the original location has never been completed, either in his own name, or in that of a third person. The ground is not subject to relocation until the old location is at an end. Whenever that ends, the relation of cotenancy has also ended. The moment that the ground becomes subject to location by reason of the failure of the parties to complete the location, the relation of cotenancy as to that ground has also ceased. The outstanding title which the defendant is attempting to get, must be the title of the United States. We have already shown, by the cases of First National Bank vs. Bissell, 4 Fed. Rep., 694, and Bissell vs. Foss, 114 U. S., 252, that a cotenant, a partner in a mining venture can buy an interest in the claim, and it does not inure to the benefit of copartners. The title of the United States is neither a hostile title nor an encumbrance on a mining claim nor a paramount title on a claim which has ceased to exist. The law expressly ends the prior claim and loca-

tion for such a failure. It is as if it never had been. The statute says:

"And upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation, in the same manner as if no location of the same had ever been made."

Revised Stat. U. S. Sec., 2324.

Lindley on Mines, Sec. 406, is quoted for this proposition. He says:

"If we are right in the conclusion reached in the preceding section, that the original locator cannot treat his failure to perform or resume work as the basis of a valid relocation, it must necessarily follow that one of several locators seeking to obtain entire title by reason of the failure of any of them to fulfill the requirement of the law, is likewise prohibited from making such location."

The premises which he lays down, that "the original locator can not treat his failure to perform or resume work as the basis of a valid relocation" is not sustained either by reason or authority.

Wornock vs. Dewit, 11 Utah, 40 Pac., 205, is a well considered case, directly against the contention.

Saunders v. Mackay, 5 Mon., 523; 6 Pac., 361, is also directly opposed to the proposition.

The author then quotes Turner vs. Sawyer, 150 U. S. 578-586. It does not sustain the author. The case decides that the right to advertise a co-owner out, as it is called, is limited to a co-owner who has performed the labor. Turner had purchased the interest of a co-

owner at sheriff's sale to enforce a lien, and the Court held that his was an incumbrance and that the purchase inured to the benefit of a cotenant. A very different proposition. The claim had not ceased to exist. The contention of Lindley completely nullifies the provision that the ground "shall be open to location in the same manner, as if no location of the same had ever been made."

"Here Congress has said in unmistakable language that what has once been located under the law shall not be relocated until the first location has expired."

Belk vs. Meagher, 104, U. S., 285.

And has said in equally unmistakable language, that when the previous location has expired, the ground shall be open to location in the same manner as if no location of the same had ever been made. It would seem to inevitably follow, as held in the following cases, that a cotenant in the previous location can relocate and leave out his cotenants. If so, it is immaterial whether in his own name or the name of another.

Strong vs. Ryan, 46 Cal., 33; 1 Mor. Min Rep., 48.

Dougherty vs. Morris, 16 Pac., 911 (Colo.) 11 Colo., 12.

Saunders vs. Mackey, 6 Pac., 361 (Mon.) 5 Mon., 523.

Hunt vs. Patchin, 35 Fed. Rep. 816.

The fact that in the last case the Court held that the new location was made under such circumstances as to make the relocator a trustee, does not detract from

its force. These circumstances are entirely independent of, and in addition to the previous relation of cotenancy under the prior location. See also

Page vs. Summers, 70 Cal., 121; 12 Pac. 120.

Nor is the argument sound that because a resumption of work may reinstate the rights of the former locators, therefore, the relation of cotenancy continues It ends when the location ends. The location must end before a new one can be made. The relation is also reinstated if the location is reinstated, not otherwise This, however, is not the question here at all, and we have gone into it, because appellant insisted on it in the Court below, and we presume will do so in this Court There was no failure to do work. The location never was completed. The failure to record the location notice left it open for location. Therefore, no trust relationship arises from the making of the Washington location, whether made in Pilkey's name or not, and all collusion and conspiracy charged in the bill, whether true or not, is wholly immaterial. The trust must turn upon the specific performance of the written contract if at all, and we think we have fully demonstrated that no case is made out for such relief.

XIII.

Appellant says that the failure to record the location notice did not work a forfeiture of any rights which may have been acquired by posting the notice on the claim, and doing the other acts of ownership. This

Court, in litigation between the same parties, has decided that by this failure the plaintiff lost any rights he previously had.

Lockhart vs. Willis, 54 Pacific, 336., 9 N. M. 344.
Lockhart vs. Johnson, 181 U. S. 516.

This is res judicata as to this case, and we might leave the proposition where it is, but prefer to review the authorities to some extent. Appellant quotes Lindley on Mines, Sec. 219. This section is against him. So with section 330, where it is said: "But unless completed, the attempted location is of no avail against intervening rights." Section 390 is to the same effect Section 274 seems to be the one principally relied upon. We submit that it, and the authorities cited do not sustain the proposition. This is an act of location. These are conditions precedent, annual labor is a condition subsequent. There is no appropriation, no location until the notice is recorded, and whenever required by the local law, a failure to record renders all else that may have been done nugatory, if a new location is made.

Lindley on Mines, Secs. 330, 273, 390.
King vs. Edwards, 1 Mon., 236; 4 Mor, Min. Rep., 480.

In discussing the local laws requiring work to complete a location, the Supreme Court of Nevada says:

"Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for non-compliance or not, and the mining

claim becomes subject to location by any qualified locator."

Sissons vs. Sommers, 55 Pac. Rep., 829,

Citing,

Ehrhart sv. Boaro, 113 U. S., 527.
Mallett vs. Min. Co., 1 Nev., 188.
Barringer & Adams, Mines 300.
Hamilton vs. Hudson, 53 Pac., 101.

XIV.

We agree with appellant that if the "Sampson" location was recorded before and bona fide right had intervened, it related back and made the Sampson location valid. Wheave contended for this under the allegations, in the bill, all the time, and that for that reason the remedy was at law and not equity. The only fact which could have rendered the Washington location invalid, would have been a tortious entry on plaintiff's possession, actual or constructive, for the purpose of making the location.

XV.

We respectfully submit that a reading of the decision of the Court in Lockhart vs. Wilis, 54 Pacific, 336; 9 N. M.,344, and the application of what is there said as to the evidence in that case, to the pleading on this case will conclusively show that plaintiff has not stated a case entitling him to relief.

XVI.

We call the Court's attention expressly to the 4th

6th and 7th grounds of demurrer, and insist that the decision of the Court below should be affirmed; we will not repeat them here. (See transcript, folio 90.)

In some of the authorities already cited, the rule is laid down that the Court will scrutinize a bill much more closely on demurrer than on final hearing, to determine whether it alleges a case with sufficient clearness and certainty, to command relief in equity. If there is a plain failure to state a case not remediable at law it would be the duty of the Court to dismiss the bill at any stage of the cause. We do not dee mit necessary to quote authorities for this.

We submit that the decree of the Court below should be affirmed.

W. B. CHILDERS,

Solicitor for J. A. Johnson, Julia A. Johnson, Charles Pilkey, Charles Bonsall, Receiver, and for himself in his own person.

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States

October Term, 1904.

HENRY LOCKHART, Appellant
vs.
H. C. LEEDS, et als. } No. 10.

HENRY LOCKHART, Appellant
vs.
H. C. LEEDS, et als. } No. 289.

Brief of Appellees on Motion to Pass No. 10,

Under Rule 26, and to Advance No. 289, that they may be heard as one case.

W. B. CHILDERS,
Attorney for Appellees.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

[illegible], APPELLANT,
vs.
H. C. LEWIS, ET AL. } No. 10.

[illegible], APPELLANT,
vs.
H. C. LEWIS, ET AL. } No. 200.

Brief of Appellees on Motion to Place No. 10 under Rule 16, and to Advance No. 200, that they may be Heard as One Case.

Appellees feel compelled to object to the entertaining of the motion made by appellants in this case, because—

First. That the same questions are not involved in the two cases.

Second. That the Attorney for the appellee is present, and the briefs are on file ready to argue the case No. 10, and that it would require him to return from New Mexico

to Washington for the purpose of arguing these cases if the motion is entertained.

As to the first proposition, the cases are not the same. Attorney for appellees makes the following

STATEMENT.

The litigation in both cases does relate to the same mining property, but the questions involved in the two cases are entirely different.

It is true that at the October term 1900, the ejectment case of *Lockhart* vs. *Johnson* (181 U. S., 516) was submitted and decided by this court. It is also true that in the decision of that case the Court said.

> "Although the plaintiff has no right to maintain "this action yet he ought not to be embarrassed by "a judgment here from pursuing any other remedy "against the defendants or either of them, that he "may be advised; and in order to avoid any com- "plications of that nature, which probably might "result from an absolute affirmance of the judgment "of the supreme court of the Territory, we modify "the terms of that judgment by providing that it is "entered without prejudice to the enforcement by "other remedies, or the rights, if any, which the "plaintiff may have against the parties defendant, "or either of them, and as so modified, such judg- "ment is affirmed."

Case No. 10 had been pending in the District Court of the Territory of New Mexico long prior to the decision

in the ejectment suit. In fact, the action was brought in case No. 10 before the ejectment suit was ever brought. Appellants delayed appealing this case to the Supreme Court of the Territory as long as they could. On the 24th of August, 1900, the decree of the District Court in No. 10 was affirmed. Appellants then delayed taking an appeal until August 2, 1902, in No. 10, when only twenty-two days were left of the two years in which such an appeal could be taken. After the decision in the ejectment case, suit No. 289 was brought.

The bill in case No. 10 was framed upon the theory that a mining claim could not be entered under the mining laws of the United States on an unconfirmed land grant, which was *sub judice*, and prayed for the cancellation of the location under which the appellees in this case claimed, and for possession of the property. The Court below decided in that case that under the allegation of the complaint, the complainants were not entitled to cancellation of the "Washington," defendant's location, and that the facts alleged in the bill would entitle the plaintiff to recovery at law. These are the sole questions involved in this case.

In case No. 289 which was brought in the District Court after the decision in the ejectment case by this court, on the 15th of October, 1901, the complainant stated a cause of action based upon the doctrine of a constructive trust asking the court to hold the defen-

dants as patentees and owners of the Washington Mine constructive trustees. The court below held that these matters could have been set up in case No. 10, and could have been determined in that case, and therefore, the decree in that case was *res judicata* or worked an *est oppel*. It also held that other grounds in the demurrer to the complaint were good. Although not discussed in the opinion of the court below, one of the grounds was the Statute of Limitations of the Territory of New Mexico, which provides that no action or suit for relief on the ground of fraud shall be brought within four years after the discovery of the fraud and not afterwards. This plainly appears upon the fact of the bill in No. 289.

I respectfully submit that the questions involved in the two cases are not the same, although relating to the same property.

Respectfully submitted,

W. B. CHILDERS,

Attorney for Appellees.

Supreme Court of the United States.

No. 10.—October Term, 1904.

Henry Lockhart, Appellant,
vs.
H. C. Leeds, J. A. Johnson, Julia Johnson, et al., Appellees.

On appeal from the Supreme Court of the Territory of New Mexico.

[December 5, 1904.]

The appellant filed his bill in this suit in the proper court of New Mexico for the purpose of obtaining relief against the defendants mentioned therein. The defendants demurred on several grounds, among which was that the complainant's remedy, if any, was at law, and that the bill did not state a case for a court of equity. The demurrer was sustained and the bill dismissed, and the judgment of dismissal was affirmed by the Supreme Court of New Mexico, and the complainant thereupon appealed to this court. Among other things the bill averred that about May 7, 1893, the complainant and one Johnson, and the defendant Pilkey, entered into an agreement in Bernalillo County, New Mexico, by which they were to become partners in the enterprise mentioned in the agreement, and that for the consideration mentioned therein Pilkey was to start out to discover, if possible, and to locate for the purpose of operation by the parties, any mining claim of gold, silver or other metal, and that in order to enable Pilkey to carry out his portion of the agreement he was to be furnished certain tools, etc., and some money. If he discovered any such mine it was his duty to locate the same and to send in to the other partners specimens of the ore in order that its value might be determined. Work was to be begun within twenty days after the signing of the agreement. Any fraud by Pilkey was to forfeit his share, which was to be one-third interest in any mine discovered and worked.

The agreement was to continue for a year, and all discoveries and locations of any mines during that time by Pilkey were to be under the agreement mentioned. After the making of this agreement Pilkey started out to prospect and to discover, if possible, a mining claim of the character mentioned. The parties were aware at the time of the execution of the agreement of the existence of the place where Pilkey went for the purpose of prospecting and discovering a mine, and that there possibly might be a valuable claim at that place. Accordingly, Pilkey at once went to the spot, and on or about the 10th of July, 1893, he discovered the claim at that place, and it turned out to be a valuable mine. He located the mine according to the agreement, and posted the notice thereon

provided by the laws of the United States and New Mexico, and proceeded to do work thereon pursuant to the provisions of those laws, but did not do all the work made necessary by them. The bill then alleges that Pilkey commenced to sink a shaft or cut upon the mineral bearing lode, and did work enough thereon to arrive at mineral bearing ore in place, within less than ninety days from the time of taking possession of the lode, and it is then averred that the parties were ready, able and willing in all things to comply with the laws spoken of, "and would have so done except for the wrongful, fraudulent and unlawful acts of the defendants hereinafter mentioned." Some time about the 1st of October, 1893, Pilkey, while so in possession of the lode, wrongfully and fraudulently conspired, combined and confederated with the defendants to defraud plaintiff, and they agreed that said Pilkey, in violation and fraud of the rights of the plaintiff in and to the mine, should transfer, convey and deliver possession of the mine to the defendants, or one of them, without the knowledge or consent of plaintiff and the said Johnson. This was done. It was also agreed that they should do all other acts necessary to transfer the right to defendants. Pilkey was to have a certain proportion of interest in the mine and the defendants the balance. The defendants also caused and procured the defendant Pilkey to stop work upon the mine under the agreement already referred to, and it was also agreed that Pilkey should fail and neglect to record, in the proper office, a copy of the location notice posted by him on the ground. The defendants also covered up and concealed the work which had been done on the ground by Pilkey, and they posted another notice thereon and called the mine the "Washington" mine, and filed a copy of the same for record December 13, 1893, without the knowledge or consent of the plaintiff or his copartner, Johnson, and they made the location for the benefit of themselves as locators under the mining laws of the United States. For the purpose of concealing the interest of Pilkey in such pretended location it was agreed that each of the four defendants named should be entitled to a fifth interest, and that Pilkey should be entitled to the remaining fifth, which last-named interest should be claimed and held by Walker in trust for Pilkey. Johnson subsequently transferred all his interest, under the agreement of copartnership between plaintiff, Johnson and Pilkey, to the complainant, who was, at the time of the commencement of the suit, the owner of Johnson's interest under the assignment. The bill further states that after the removal by the defendants of the original location notice posted by Pilkey, as already stated, the complainant procured a copy thereof and had the same recorded in the office of the recorder of the county on December 9, 1893. The complainant averred that, by virtue of the premises, he became and was at the commencement of the suit the equitable owner of said mine, and of the gold and silver ores

therein contained, so discovered and located by Pilkey under the agreement, and that he was equitably entitled, as against the defendants, to the possession and enjoyment of the same and to the preferential right to acquire the legal title from the United States, and that the pretended location of the mine under the name of the Washington mine, by and in the names of the defendants named, was wholly inoperative and void, and that Pilkey, by reason of his participation in a fraudulent conspiracy with the defendants, forfeited all right or interest in the said mine pursuant to the agreement made by Pilkey with complainant and Johnson, and complainant averred that he was equitably the owner of and entitled to such interest. He further averred that the defendants refused to permit complainant to enter upon the property or to work the same, and that the defendants claim title to the mining property under and by virtue of their agreement with Pilkey and their pretended location of the same as the Washington lode. It is further averred that the defendants were engaged in mining, extracting and converting to their own use the ores and minerals contained in the mine and had mined and removed ores and minerals of great value therefrom, and had converted to their own use all such mineral, and that, unless enjoined, they would remove all the ores and minerals, and thereby the entire substance and value of the property would be destroyed and the complainant would sustain irreparable injury, as the defendants, or some of them, were wholly insolvent. To this bill the defendants demurred, as already stated.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

One phase of this controversy has already been before this court in *Lockhart* v. *Johnson*, (181 U. S. 516,) which was an action of ejectment brought by the plaintiff (who is the complainant herein) to recover possession of the mine above mentioned from the defendants herein. It was there held that the plaintiff could not maintain an action, as the facts showed that he had no legal title, and that the remedy he might have, if any, was in equity.

Upon the trial of the ejectment action the plaintiff offered to prove in substance the same facts as are set forth in this bill in regard to Pilkey's action under the agreement with plaintiff and Johnson, and the fraudulent conspiracy entered into by the defendants for the purpose of defrauding the plaintiff out of his right to such mine. The evidence was objected to and excluded on the ground that it did not show any legal title in the plaintiff, assuming its truth; that in the courts of the United States an action of ejectment was based upon the strict legal title, and if the plaintiff failed to show that it was in him he must fail in such action. The defendants now contend that if the plaintiff have any remedy it is at law, and

also that there is no cause of action stated in the bill. At the time of the trial of this suit the ejectment action had not been decided by this court, the action having been here decided May 13, 1901. It must be regarded, as determined by the decision in that case, that the complainant herein has no remedy at law, and if he has none in this suit he is without remedy for the gross fraud set out in the bill. All facts well pleaded in the bill are admitted by the demurrer, and the question, therefore, is, whether the bill states facts sufficient to entitle him to relief in a court of equity.

The court below has held that the bill does not state with sufficient certainty the time when plaintiff discovered the alleged fraud set forth in the bill, in that it does not appear by any certain averment that the plaintiff did not discover such fraud before the expiration of the ninety days after the discovery of the lode in which to file a copy of the notice of location in the recorder's office, which, if he had done, he might, by himself filing the copy, have thereby fulfilled all the provisions of the statute relating to the location and recording of the notice of claim. We entirely agree with the court below that the facts constituting the cause of action in equity must be distinctly alleged so that the defendant may know what he has to meet and so that he may, if he choose, put them in the issue. The rule must receive a reasonable interpretation and must be so enforced as to further and not obstruct the administration of justice. We think the court below erred in holding that there was no sufficient averment as to the time of the discovery by plaintiff of the alleged fraud set forth in the bill, assuming such averment to have been necessary. He averred that Pilkey, acting under the agreement with plaintiff and Johnson, discovered the mine and located the same by posting the requisite notice on the ground on the 10th of July, 1893. He also averred that some time about the first of October (the exact time, however, he could not state) the defendants entered into the conspiracy and combination referred to. This was but a few days before the expiration of the statutory time in which to file a copy of the notice of claim in the recorder's office of the county. He averred that the conspiracy and combination was secret, and that while the plaintiff and his copartner Johnson were able and willing to comply with all the laws of the United States and Territory, they failed to do so because of the wrongful, fraudulent and unlawful acts of the defendants thereinafter mentioned. Those acts were a secret effacement of the work done by Pilkey, the taking down of the notice of claim posted on the ground by him, the failure to file a copy thereof, the posting of a claim on the part of the defendants, and the filing of a copy of such notice in the recorder's office on December 13, 1893.

We think the plain import of these averments is that the conspiracy and combination did not become known to the plaintiff until after the expiration of the ninety days from the discovery of the mine, in which to file

a copy of the notice posted on the ground, in the recorder's office of the proper county. That is a sufficiently definite averment of time, and it is enough to show that the failure to file a copy of the notice within the necessary time was owing to the action of the defendants.

Under the agreement first mentioned between plaintiffs, Johnson and Pilkey, as copartners, it became the duty of Pilkey, in order to complete the location it was his duty to make, to file a copy of the notice in the recorder's office, and the parties to the agreement had the right to rely upon Pilkey to file the necessary copy for record, and it is plain that the failure to file on the part of the plaintiff was because of his ignorance of such failure on the part of Pilkey consequent upon Pilkey's fraudulent conspiracy and agreement with the other defendants not to file it. After the discovery of the conspiracy the plaintiff did procure a copy of the original notice posted by Pilkey on the ground and filed the same in the office of the recorder on the 10th of December, 1893. Taking these allegations together, we think it hypercritical to hold that the bill does not with sufficient distinctness allege the fact that the plaintiff did not discover the fraud until after the expiration of the ninety days mentioned, and hence did not himself file the copy notice within that time.

All pleadings must be construed reasonably and not with such strictness as to refuse to adopt the natural construction of the pleading because a particular fact might have been more distinctly alleged, although its existence is fairly, naturally and reasonably to be presumed from the averments made in the pleading.

The agreement between the plaintiff, Pilkey and Johnson shows it to have been the duty of Pilkey to make the necessary filing for record in order to complete the location of the mine which he in the agreement was to do. The plaintiff had the right to rely upon Pilkey carrying out that agreement and fulfilling his duty thereunder by making the necessary filing, and plaintiff alleges that he would have done all things made necessary by law had it not been for this fraudulent combination and conspiracy on the part of the defendants. We regard the allegations of the bill as sufficient in these particulars.

Again, it is alleged that the bill prays that the location of what is called the Washington lode by the defendants be declared void, and that the plaintiff may have the possession of the claim, while the plaintiff now asks to have the defendants treated as constructive trustees, etc., which is inconsistent, as alleged, with the former prayer for relief. The bill contains a prayer for general relief in addition to the prayer for special relief, and under such prayer this relief may be given. It is objected that under the prayer for general relief no relief of that nature can be granted, inasmuch as it is opposed to the special relief asked for by the bill, and also because the general allegations in the bill do not justify such relief. All the facts

upon which the plaintiff asks relief from a court of equity are clearly stated in the bill. The facts constituting the fraud are set forth, and it is alleged that the parties doing the acts mentioned concealed them from the plaintiff for the purpose of defrauding plaintiff out of his interest and ownership in the mine. Having set out all the facts upon which the right to relief is based, the plaintiff asks specially for the possession and also for the proceeds of the mine, because, by reason of the facts the location made by the defendants was a void location. Whether it was a void location or not, was matter of law arising from the facts appearing in the bill. These facts were not changed in the slightest degree, nor were any inconsistent facts set up thereafter. The plaintiff now under his prayer for general relief contends that, although the location of the Washington lode by the defendants may have been so far valid as to create a title in the defendants, yet that by reason of the fraud already distinctly set forth in the bill the plaintiff was entitled to avail himself of that title, and to hold them as trustees *ex maleficio*, for his benefit.

There is nothing in the intricacy of equity pleading that prevents the plaintiff from discussing the relief under the general prayer to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers. The cases of *English v. Kimball*, [2 Pac. 500;] *Rose v. Clarke*, [10 Pac. 177;] *Wallace v. St. Louis Mining Co.*, [11 Pac. 102;] *Gay and v. National Bank*, [91 U. S. 624;] *Georges v. Stanton*, [3 Wall. jr., are not opposed to the views just stated.

We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill, and that is adverse to what is held by the above cases. The case made by the bill consists of the material facts therein stated, and when all the facts are such it is no reason for denying relief under a general prayer, because it may differ from the theory of the law upon which the special prayer for relief is based, where both prayers are based upon the same facts clearly set forth in the bill.

The defendants contend that if Pilkey, under the fraudulent agreement alleged, and pursuant thereto, surrendered possession to the defendants, the latter became cotenants with the plaintiff, and he could maintain no action at law to recover possession from his cotenants. We have already held that the plaintiff could not, upon the facts, maintain ejectment. When Pilkey surrendered possession to defendants under the fraudulent agreement, and they entered and posted the notice and filed the copy, they did not entitle plaintiff to maintain ejectment against them as upon the case of possession by defendants.